DOCKET

No. 87-329-ASX
Status: GRANTED

Title: Florida Star, Appellant
v.
B. J. F.

Docketed:
August 26, 1987

Court: District Court of Appeal of Florida,
First District

Ccunsel for appellant: Rahdert,George K.

Counsel for appellee: Hubener,Louis F., Eaton,Joel D.

NOTE* Notice of Appeal filed 8/24/87

Entry	Date	Note	Proceedings and Orders
1	Aug 26 1987	G	Statement as to jurisdiction filed.
2	Sep 8 1987		Waiver of right of appellee Florida to respond filed.
4	Sep 18 1987		Order extending time to file response to jurisdictional statement until October 14, 1987.
6	Oct 14 1987	X	Motion of appellee B.J.F. to dismiss or affirm filed.
7	Oct 14 1987		REDISTRIBUTED. October 30, 1987
8	Oct 14 1987	X	Brief amicus curiae of Times Herald Printing Co. filed.
9	Oct 14 1987	X	Brief amicus curiae of Reporters Committee for Freedom of the Press filed.
10	Oct 29 1987		Reply requested of appellant addressing the issue of jurisdiction 10/30/87. Due 11/10/87. (AS)
12	Nov 10 1987	X	Reply brief of appellant The Florida Star filed.
14	Nov 10 1987		DISTRIBUTED. November 25, 1987.
15	Nov 12 1987		Application of appellant for leave to file a reply brief in excess of the page limitation filed (A-379), and
17	Nov 12 1987		order granting same by O'Connor, J., on Nov. 12, 1987. The brief may not exceed 16 pages.
18	Nov 17 1987		Appellee's lodging received and distributed.
20	Nov 30 1987		REDISTRIBUTED. December 4, 1987
22	Dec 7 1987		REDISTRIBUTED. December 11, 1987
27	Dec 14 1987		Because this appeal involves a question of law of the State of Florida which is determinative of this cause and for which there is no controlling precedent of the Supreme Court of Florida, this Court, pursuant to Article V, Section 3(b)(6) of the Florida Constitution, certifies to the Supreme Court of Florida and respectfully requests that Court to answer, the following question: Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal? It is further ORDERED: That the Clerk of this Court shall transmit to the Supreme Court of Florida certified copies of this order and the briefs filed in this Court in this matter; And it is further ORDERED:That this Court shall retain jurisdiction of this matter and that the proceedings in this Court shall be held in abeyance until further order of this Court.
25	Sep 1 1988		Question certified to Supreme Court of Florida by order

No. 87-329-ASX

Entry	Date	Note	Proceedings and Orders
			dated December 14, 1987.
26	Sep 6 1988		Certified Question answered by the Supreme Court of Florida.
24	Sep 14 1988		REDISTRIBUTED. October 7, 1988
28	Oct 11 1988		PROBABLE JURISDICTION NOTED.
			**********
30	Nov 4 1988		Order extending time to file brief of appellant on the merits until December 2, 1988.
31	Nov 18 1988		Record filed.
		*	Certified copy of original record, volumes I - III received.
32	Dec 2 1988		Brief amici curiae of American Newspaper Publishers Assn., et al. filed.
33	Dec 2 1988		Joint appendix filed.
34	Dec 2 1988		Brief of appellant The Florida Star filed.
35	Dec 2 1988		Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
37	Dec 14 1988		Order extending time to file brief of appellee on the merits until January 17, 1989.
38	Jan 17 1989		Brief amicus curiae of Pacific Legal Foundation filed.
39	Jan 17 1989		Brief of appellee B.J.F. filed.
40	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 21, 1989. (3RD CASE)
41	Feb 8 1989		CIRCULATED.
42	Feb 17 1989	X	Reply brief of appellant The Florida Star filed.
43	Mar 21 1989		ARGUED.

JURISDICTIONAL

STATEMENT

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-329

No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This case involves a civil cause of action based upon a criminal statute. Suit was brought against the owner of a newspaper for the negligent disclosure of information contained in a police crime report, *i.e.*, a rape victim's name. The questions presented are:

(1) Whether a statute which imposes criminal penalties for the publication of truthful information obtained from a government record violates the First and Fourteenth Amendments?

(2) Whether a statute violates the First and Fourteenth Amendments in its imposition of strict liability for invasion of privacy for the publication of truthful information legally obtained from records of a state agency?

RULE 28.4.(c) STATEMENT

In this proceeding, the constitutionality of Section 794.03, Florida Statutes is drawn into question. The State of Florida is not a party to this proceeding. Because 28 U.S.C. §2403(b) may be applicable, this jurisdictional statement is being served upon Robert A. Butterworth, Attorney General of the State of Florida.

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No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellant, *The Florida Star*, appeals from a judgment of the First District Court of Appeal in a civil action for the negligent publication of a rape victim's name in violation of a Florida criminal statute.

OPINIONS BELOW

The order of the Florida Supreme Court which denied review of the Florida First District Court of Appeal decision is reported at ..... So.2d ..... It is reprinted in the Appendix at A1.

The judgment of the Florida First District Court of Appeal is reported at 499 So.2d 883. It is reprinted in the Appendix at A2-A3.

The trial court order which granted judgment for appellee is not reported but is reprinted in the Appendix at A5-A6.

JURISDICTIONAL GROUNDS

On May 28, 1987 the Supreme Court of Florida entered an order denying discretionary review of a Florida appellate court judgment which affirmed a trial court judgment holding a state statute valid. The order of the Florida Supreme Court specifically prohibited any motion for rehearing. (A1) Appellant filed the Notice of Appeal in the First District Court of Appeal and the Florida Supreme Court on August 24, 1987. This appeal is being docketed within ninety days from entry of the order denying Appellant's Petition for Discretionary Review.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2) as an appeal which draws into question the validity of Florida statute §794.03 on the grounds that it is repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

U.S. Const. amend. XIV, §1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . ."

STATUTORY PROVISION INVOLVED

Florida Statutes §794.03:

Unlawful to publish or broadcast information identifying sexual offense victim. No person shall print, publish, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

HOW THE FEDERAL QUESTION WAS RAISED

Prior to trial, *The Florida Star* raised the federal questions as an affirmative defense,[1] and in a motion to dismiss the complaint,[2] which the court denied.[3] At trial, *The Florida Star* moved for a directed verdict on the ground that this application of Section 794.03 violates the First Amendment of the United States Constitution. The trial court denied the motion and specifically upheld the

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1. "Defendant further defends and alleges that the information was made freely available without restriction to the Defendant and to restrain Defendant from publication is violative of the 1st and 14th Amended (sic) of the U.S. Constitution."

2. "Said statutory section being criminal in nature, it is an improper allegation in Plaintiff's civil cause of action. . . . [T]his Defendant . . . is entitled to the privileges and protections of the First Amendment of United States Constitution applicable to the State through the 14th Amendment of the United States Constitution. Thus, Plaintiff fails in its Amended Complaint to state a cause of action."

3. "The Motion to Dismiss Plaintiff's Amended Complaint filed by Defendant, The Florida Star, Inc., be and the same is hereby DENIED."

constitutionality of the statute.[4] The trial court later granted B.J.F.'s motion for directed verdict on the issue of negligence. The jury subsequently awarded $75,000.00 in compensatory damages and $25,000.00 in punitive damages against *The Florida Star*.

Appellant again challenged the constitutionality of the statute in the Florida First District Court of Appeal.[5] The First District affirmed the trial court's final judgment. The court's one paragraph ruling reasoned that B.J.F.'s name was private and publication is forbidden as a matter of law under Section 794.03, Florida Statutes. (A2-A3)

Subsequently, Appellant filed a Petition for Discretionary Review in the Supreme Court of Florida on the grounds that the First District's decision expressly declared Section 794.03, Florida Statutes to be valid, and that the decision expressly construed provisions of the Federal Constitution. The order of the Supreme Court of Florida in denying review validates the First District's judgment, which withdraws the First Amendment protection formerly afforded to the publication of truthful facts obtained from

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4. "THE COURT: On that argument the Court specifically rules that Statute 974.03 (sic) is constitutional. I take into consideration the First Amendment rights of the press, but I also take into consideration the recent decisions about Florida appellate courts which have stated without equivocation that those First Amendment rights must be ballast (sic) to some extent within the realms of propriety against the rights of privacy of the citizens. I do not feel that the statute is overly broad. I think it is restricted to the rather narrow provisions of Section - - of Chapter 794 of the Florida statutes which deals with a rather sensitive area of criminal offenses. Your motion on that ground will be denied." (Trial Transcript at 85-86)

5. "It is a violation of the 1st and 14th Amendments to hold a newspaper civilly liable for the accurate publication of the name of a rape victim where that name is lawfully obtained from a police report."

a state agency's records and imposes strict liability under the statute as a matter of law. This drastic precedent is not subject to further review by any Florida Court.

STATEMENT OF THE CASE

This action arose from Appellant's publication of the name of a rape victim in the "Police Reports" section of the newspaper, which is admittedly a deviation from Appellant's policy and professional ethics. B.J.F. filed a report with the Jacksonville, Florida Sheriff's Department that she had been robbed and raped by an unknown assailant. The Sheriff's Department released its incident report of this tragic crime by placing the report, fully naming B.J.F., in the Department's pressroom with unrestricted access. A reporter trainee for *The Florida Star*, a small, weekly newspaper which primarily serves Jacksonville's black community, copied down the report, which included B.J.F.'s name, and gave the information to her newspaper. The newspaper has a policy under which it does not publish the names of rape victims. However, another reporter inadvertently failed to delete B.J.F.'s name from the publication of the Police Reports. (A14) The "Police Reports" section is a restatement of information contained in reports of crimes made by citizens to the Sheriff's Department. There was no factual dispute that B.J.F.'s name was published in error and in violation of *The Star's* own policy.

The publication of Appellee's name violated Section 794.03, Florida Statutes, which imposes penal sanctions for any publication of the name of any victim of any sexual offense without any consideration of whether the information obtained had already been made public. B.J.F. brought suit against both the Sheriff of Jacksonville and *The Florida*

Star. B.J.F.'s suit against the Sheriff was on the ground that he had a statutory duty to refain from causing or allowing to be published B.J.F.'s name in an instrument of mass communication. (A8-A9) B.J.F. subsequently settled her action against the Sheriff for $2,500.00. B.J.F.'s remaining claim against *The Florida Star* was based upon an implied civil cause of action for negligence *per se* based upon the criminal statute. B.J.F. did not plead or prove the elements for invasion of privacy other than an implied cause of action based upon the penal statute. (A7-A10)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The statute held valid by the Florida decision sanctions broad, prior legislative punishment of truthful publications. As such, there is a substantial federal question as to whether a state legislature can validly impose criminal sanctions for the truthful publication of information provided by a state agency. Accordingly, the secondary question is whether a civil action of strict liability can be based upon a criminal statute which prohibits the publication of truthful information. Until this case, a civil plaintiff seeking to impose liability on a media defendant had to plead and prove an action for the tort of invasion of privacy. In this case, the Plaintiff prevailed only by showing the publication of her name was a *per se* violation of a criminal statute. This criminal statute effectuates a clear prior restraint upon the press for the publication of truthful information obtained from an official report issued by a state agency. The judgment holding the statute valid against claims of repugnancy to the freedom of the press guarantees provided by the First Amendment of the United States Constitution is contrary to the prior decisions of this Court, as well as decisions of other Federal

and State courts. Accordingly, the judgment raises a substantial federal question, and its resolution is of vital importance to the protection of the newsgathering activities of the press.

A. The Florida Decision on the Federal Questions Presented Within This Appeal Conflicts With Well Settled First Amendment Principles As Set Forth by Decisions of This Court.

The Florida court, in rejecting *The Florida Star's* claim that the Florida criminal statute could not constitutionally provide a cause of action for the publication of truthful information, clearly and directly conflicts with this Court's decision in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). In *Cox,* this Court held that a cause of action for invasion of privacy based upon the public disclosure of a rape victim's name "imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and non-speech elements that otherwise might be open to regulation or prohibition". *Id.* at 495.

The facts of this case are parallel to those in *Cox.* In *Cox,* a rape victim's name appeared in indictments which were public records available for inspection. Likewise, in this case, B.J.F.'s name appeared in police reports which were public records available for inspection in the sheriff's pressroom. As in *Cox, The Florida Star* published the name of the victim of the crime. Thereafter, the plaintiffs in *Cox* and B.J.F. in this case brought actions for money damages against the publishers, relying upon criminal statutes which provided penal sanctions for the truthful publication of information already in the public domain. In *Cox,* the trial court rejected the broadcaster's constitutional claims and held that the Georgia statute

gave a civil remedy for invasion of the right to privacy or the tort of public disclosure to those injured by its violation. Likewise, in this case, the court rejected Appellant's constitutional claims and held that the Florida statute gave a civil remedy to those injured by its violation.

When considering *Cox*, this Court considered the direct confrontation between the constitutional freedoms of speech and press and the claims of the right to privacy. *Id.* at 489. The Court noted that "the gravamen of the claimed injury is the publication of information . . . the dissemination of which is embarrassing or otherwise painful to an individual . . .". *Id.* However, this Court declined considering the broad question of whether the press may be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities. *Id.* Rather, the Court narrowed the issue to that of "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution in which themselves are open to public inspection . . .", and ruled it may not do so. *Id.* at 491. "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man." *Id.* at 496. Thus, the interests in privacy fade where the information appears in the public record. *Id.* at 494.

Subsequent to *Cox*, this Court considered penalizing the publication of truthful information within the context of a court order enjoining publication. In *Oklahoma*

Publishing Co. v. District Court, 480 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977), a pretrial order enjoined the news media from publishing, broadcasting and disseminating the name or picture of a child involved in a juvenile proceeding. An Oklahoma statute required juvenile proceedings to be held in private unless specifically ordered by the judge to be open. This Court did not directly consider whether the Oklahoma statute upon which the Oklahoma court had ruled was constitutional. However, the Court did state that based upon *Cox* and *Nebraska Press Association v. Stewart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the First and Fourteenth Amendments do not permit a state court to prohibit the publication of information which is obtained in court proceedings which had been open to the public. *Oklahoma Publishing* at 310. As in the case of *The Florida Star*, the reporters in *Oklahoma Publishing* obtained the identity of the juvenile from public access which was not prohibited by the court or any other state agency.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), this Court considered a statute which imposed criminal penalties for divulging truthful information regarding proceedings before a confidential state judicial review commission. The information was provided to the newspaper in violation of state law. Ruling that the statute was unconstitutional, this Court stated: "the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.* at 838.

Lastly, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), this Court once again ruled that a statute which made it a crime for a newspaper to publish the name of a child charged as a youthful offender without written approval of the Court violated the First and Fourteenth Amendments because it punished the truthful publication of information. In *Smith,* the newspaper did not obtain the information from "court records of judicial proceedings" as in *Cox,* but from monitoring the police band radio frequency and interviewing witnesses. The Court viewed this method of newsgathering as "lawfully obtained." Likewise, *The Florida Star* obtained B.J.F.'s name lawfully from police reports placed in a public access pressroom by the Sheriff's Department.

In *Smith,* the Court noted that whether a statute is viewed as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information was not dispositive because both require the highest form of State interest to sustain validity. *Id.* at 101-102. This Court found that the statute could not satisfy the constitutional standards defined in *Landmark* and noted "[s]tate action to punish the publication of truthful information seldom can satisfy constitutional standards . . .". *Id.* at 101. Additionally, the Court stated "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order . . .". *Id.* at 103. Additionally, the Court noted that although prior cases involved situations where the government itself provided or made possible press access to the information, that factor was not controlling. *Id.* at 103. "[A] free press cannot be made to rely solely on the sufferance of the government to supply it with information." *Id.* at 104.

The Florida court's decision in this case clearly conflicts with the prior precedent of this Court as set forth in *Cox, Oklahoma Publishing, Landmark* and *Smith.* As in all of those cases, the Florida statute criminally punishes the publication of truthful information in violation of the First and Fourteenth Amendments. Likewise, as in *Cox, Oklahoma Publishing,* and *Smith,* the statute imposes a penalty even where the information was legally obtained by a legitimate method of newsgathering and which was made available to the press and public by a state agency.

As the Court in *Cox* ruled, "there is no liability for giving publicity to facts about the plaintiff's life which are matters of public records . . .". *Cox* at 494. In this case, the reporter obtained the information regarding the rape victim's name from the sheriff's pressroom. Any member of the public had access and could have read the police report for themselves. No liability could have been predicated on the fact that a member of the press, or any other member of the public, had only obtained the information, but not published it. It was the publication which triggered the availability of penal sanctions. *Cox* recognized that "interest in privacy fades when the information involved already appears on the public record." *Id.* "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Id.* at 495.

Public records, by their very nature, are of interest to those concerned with the administration of government. The public benefits when the media reports the true contents of government records. "The freedom of the press to publish the information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public

business." *Cox* at 495. "The commission of crime . . . [is] without question [an event] of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Id.* at 492. The effect of the Florida ruling has resulted in precisely the danger which the Court sought to avoid in *Cox*:

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public . . . If there are privacy interests to be protected . . ., the States must respond by means which avoid public documentation or other exposure of private information.
>
> *Id.* at 496.

In this case, the Florida court decision sustaining the constitutionality of the criminal statute, and thereby the implied cause of action, will not only result in timidity and self-censorship among the media in general, but will also put a small minority owned newspaper out of business.

B. The Florida Decision on the Federal Questions Presented Within This Appeal Conflicts With Decisions of Federal Courts and State Courts Which Have Considered the Same Federal Questions.

Federal courts have considered the same questions which were presented to the Florida court in this case, and have reached opposite results. In *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), the court considered an Indiana statute which provided for the criminal punishment of any person who truthfully published the name of an individual against whom a sealed criminal indictment or information had been filed. In *Worrell*, the reporter had been denied access to the information by government sources yet had obtained the same information from a confidential source. After reviewing the pertinent case law, including citations to *Cox*, *Landmark*, *Oklahoma Publishing*, and *Smith*, the court ruled that on its face the statute was an unconstitutional infringement on the First Amendment. *Id.* at 1221, 1223.

In *WXYZ, Inc. v. Hand*, 658 F.2d 420 (6th Cir. 1981), the court considered the constitutionality of a Michigan statute which allowed the court to suppress the name of a sexual offense victim, the alleged perpetrator, and the details of the crime. One of the stated purposes of the statute was the protection of privacy of the accused and the victims. *Id.* at 425. Citing *Smith*, the court found that even if the statute provided only a penal sanction after publication of information about alleged sexual offenses rather than operating as a prior restraint, it would still require the highest form of state interests to sustain its validity. After reviewing *Cox*, *Oklahoma*, *Landmark*, and *Smith*, the court affirmed the District Court's ruling that the statute was unconstitutional.

The case of *Holman v. Central Arkansas Broadcasting Co., Inc.*, 610 F.2d 542 (8th Cir. 1979) is applicable to this case for a different reason, even though it did not involve the construction of a penal statute. *Holman* cited *Cox* for the proposition that no right to privacy is invaded when state officials allow or facilitate the publication of an official act, such as an arrest. Likewise, those principles apply to this case, where state officials allowed the publication in their pressroom of a citizen's act of reporting a crime.

Accordingly, because the statute is unconstitutional, it cannot provide a basis for an implied cause of action. A state may not impose damages for publication of information if it cannot also constitutionally make the publication of that information a crime. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

State courts have also considered issues similar to to the questions presented in this case and have come to results which conflict with the Florida ruling. In *State v. Stauffer Communications, Inc.*, 592 P.2d 891 (Kan. 1979), the Supreme Court of Kansas construed a statute which provided criminal sanctions for the publication of information concerning the issuance of arrest warrants prior to their execution. The court ruled that the Federal Constitution forbids the imposition of criminal sanctions for truthful reporting of facts gleaned from public records. Furthermore, citing to *Cox* and *Oklahoma Publishing*, the court stated that by placing the information in an official public record, the State thereby released the information to the public.

In *Ayers v. Lee Enterprises, Incorporated*, 561 P.2d 998 (Or. 1977), a rape victim attempted to predicate an implied cause of action for invasion of privacy on that

state's Public Records Act, claiming an exemption within the Act required confidentiality of her identity, as did the Appellee in this case. She brought suit against the Police Department for releasing her name and address, and against the newspaper for printing that information. One of the issues was whether the exemption was in effect at the time of publication. However, the court cited *Cox* and stated that even if the exemption had been in effect, the plaintiff's name and address became a matter of public record so as to be available to public inspection when she reported it to the police. *Id.* at 1003. The court then ruled that her complaint failed to allege sufficient facts to constitute a cause of action for invasion of her right to privacy.

Lastly, in *Boettger v. Loverro*, 502 A.2d 1310 (Pa. Super. Ct. 1986) the plaintiff brought an action impliedly based upon a statute which provides for a civil action for unlawful disclosure of wiretap communications. The court considered *Cox, Oklahoma Publishing, Landmark,* and *Smith*, and ruled that an attempt to impose civil liability on the newspaper's publication of that information was unconstitutional and violated the First and Fourteenth Amendments of the United States Constitution. The court noted that the information published by the newspaper was part of court records accessible to the public as were the facts in the case of *Cox*, that the information was statutorily required to be sealed or confidential, as was true in *Landmark*, and that the information had been obtained in a lawful manner and reported accurately, as in *Cox, Landmark*, and *Smith*. The court then concluded that the legislature did not intend the statute to be construed to impose liability on a newspaper for its publication of information of legitimate public concern lawfully obtained from court records accessible to the public, and that the section therefore, included an implied exception.

CONCLUSION

Prior decisions of this Court clearly prohibit legislatively mandated punishment of the publication of truthful information obtained from a state agency, as has now been sanctioned by the decision validating the Florida statute. Section 794.03 is clearly unconstitutional under prior precedent from this Court, and cases from other Federal and State courts. Accordingly, any implied cause of action based upon this unconstitutional statute cannot withstand constitutional scrutiny. The questions presented, whether a statute can impose criminal sanctions for the publication of truthful information even where the information is obtained from a government agency, and whether strict liability may be implied from such a statute, are of such substantial nature as to require plenary consideration for their resolution. The harsh precedent of this case will have a severe impact on newsgathering activities previously protected by the First Amendment. For that reason, this case merits this Court's full consideration.

Appellant respectfully requests this Court to note probable jurisdiction, and order briefing and oral argument in this case.

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APPENDIX

SUPREME COURT OF FLORIDA

- Thursday, May 28, 1987

THE FLORIDA STAR, a Florida corporation, Petitioner,	)	Case No. 70,089
v.	)	District Court of Appeal, First
B.J.F., Respondent.	)	District No. BK-253

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., EHRLICH, BARKETT, GRIMES and KOGAN, JJ.. concur

A True Copy

TEST:
Sid J. White (Seal)
Clerk, Supreme Court
By: /s/ (Illegible)
Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. John S. Cox, Judge
Richard J. Geisert, Esquire

R. J. Beckham, Esquire
Paul J. Levine, Esquire
Denise M. Prescod, Esquire
Joel D. Eaton, Esquire
Richard J. Ovelmen, Esquire
George K. Rahdert, Esquire

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE FLORIDA STAR,	)	
Appellant,	)	
vs.	)	Case No. BK-253
B.J.F.,*	)	
Appellee.	)	

Opinion filed December 15, 1986.

An Appeal from the Circuit Court for Duval County.
John S. Cox, Judge.

Denise M. Prescod, Jacksonville, for Appellant.

Joel D. Eaton of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami and Beckham McAliley & Schulz, P.A., Jacksonville, for Appellee.

Paul J. Levine and Wendy H. Cohen of Morgan, Lewis & Bockius, Miami, for Amicus Curiae, The Florida First Amendment Foundation.

PER CURIAM.

This cause is before us on appeal from a final judgment awarding compensatory and punitive damages pursuant to a jury verdict. We affirm.

---

*The style of the case has been revised by the court sua sponte in order to preserve appellee's privacy interests.

The threshold question is whether this court has jurisdiction. We find that appellant abandoned the post-trial motions, and we distinguish this case from *Leopard v. State,* 489 So. 2d 859 (Fla. 1st DCA 1986), and *Lloyd v. Harrison,* 489 So. 2d 856 (Fla. 1st DCA 1986), wherein the post-trial motions were filed prior to the notice of appeal being filed. In those cases, the sequence of filing rendered the orders on appeal nonfinal until disposition of the post-trial motions; whereas the simultaneous filing, which occurred here, amounts to an abandonment of the post-trial motions.[1]

Reaching the merits, we find that the information published, the rape victim's name, was of a private nature and not to be published as a matter of law.[2] *See Doe v. Sarasota-Bradenton Florida Television Company, Inc.,* 436 So. 2d 328, 330 (Fla. 2d DCA 1983), particularly the reference to Opinion 075-203 of the Attorney General of Florida (July 14, 1975), which suggests that Section 794.03, Florida Statutes, be applied to the prosecution of parties publishing nonpublic information.

Accordingly, we affirm.

BOOTH, C.J., and WENTWORTH and ZEHMER, JJ., CONCUR.

---

1. Our review of the record fails to reveal that any of the post-trial motions could be deemed "pending" at the time the notice of appeal was filed. Thus, there appears no error in the trial court's determination that it was divested of jurisdiction by the filing of the notice of appeal.

2. Section 794.03, Florida Statutes, is pertinent and states:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6152

DATE: January 23, 1987
CASE NO: BK253

THE FLORIDA STAR
Appellant/Petitioner

vs

BETTY JEAN FREEMAN
Appellee/Respondent

ORDER

Motion for rehearing and for clarification DENIED.

By Order of the Court
Raymond E. Rhodes, Clerk

(Seal)

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Paul J. Levine, Esquire, Wendy H. Cohen, Esquire, Miami, Florida, Denise M. Prescod, Esquire, Jacksonville, Florida, Richard J. Geisert, Esquire, Miami, Florida, R.J. Beckham, Esquire, Jacksonville, Florida, Joel D. Eaton, Esquire, Miami, Florida

/s/ (Illegible)
Deputy Clerk

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 84-11791-CA DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

-vs-

THE FLORIDA STAR, INC.,
a Florida corporation,
Defendant.

AMENDED FINAL JUDGMENT

This cause was tried before a jury and pursuant to the verdict returned on December 11, 1985 by the jury duly impanelled and sworn to try the issues of this cause, and taking into consideration that the defendant is entitled to a set-off against the sums awarded by said verdict in the sum of $2,500.00, representing a like sum paid to plaintiff in settlement prior to trial by the former co-defendant, Dale Carson, Sheriff of Jacksonville, it is

ORDERED AND ADJUDGED that the plaintiff, Betty Jean Freeman, do have and recover of and from the defendant, The Florida Star, Inc., a Florida corporation, compensatory damages in the sum of $72,500.00, together with punitive damages in the sum of $25,000.00, all in the aggregate total sum of $97,500.00, for which let execution issue. This Amended Final Judgment supersedes and replaces the Final Judgment previously entered on December 11, 1985.

Costs will be taxed in favor of said plaintiff and against said defendant, The Florida Star, Inc., a Florida

corporation at a subsequent time upon proper motion therefor and hearing thereon.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 17th day of December, 1985.

/s/ John S. Cox
Circuit Judge

Copies:
R. J. Beckham, Esquire
Denise M. Prescod, Esquire

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 84-11791-CA
DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

vs.

DALE CARSON, SHERIFF OF JACKSONVILLE, and THE FLORIDA STAR, INC., a Florida corporation,
Defendants.

AMENDED COMPLAINT

Plaintiff, BETTY JEAN FREEMAN, sues defendants, DALE CARSON, SHERIFF OF JACKSONVILLE, and THE FLORIDA STAR, INC., and alleges:

1. This is an action for damages which exceed the sum of $10,000.00.

2. At all times material hereto, Plaintiff, Betty Jean Freeman, was a citizen and resident of Duval County, Florida.

3. At all times material hereto, Defendant, Dale Carson, Sheriff of Jacksonville, on behalf of the City of Jacksonville, acted through agents and employees, and such agents and employees acted within the course and scope of such agency and employment.

4. Plaintiff, Betty Jean Freeman, has complied with the Waiver of Sovereign Immunity Statute's conditions precedent to maintaining an action as required by §768.28, Florida Statutes.

5. At all times material hereto, Defendant, The Florida Star, Inc., was a Florida corporation licensed to do business in the State of Florida, maintaining its principal place of business in Duval County, Florida. Said defendant is the owner and publisher of a newspaper, to-wit: THE FLORIDA STAR, which is published in Duval County, Florida.

6. At all times mentioned herein, said newspaper had a wide circulation in Duval County, Florida.

7. Prior to October 29, 1983, specifically, at 6:27 a.m. on October 20, 1983, Plaintiff, Betty Jean Freeman, was sexually battered. Immediately thereafter, Mrs. Freeman duly reported said rape to the Sheriff's Department, as required by law. Subsequently, the Sheriff of the City of Jacksonville released information to the Defendant, The Florida Star, Inc., clearly identifying Plaintiff as the victim of a sexual attack and describing the details of said attack.

8. On or about October 29, 1983, the Defendant, The Florida Star, Inc., published an article whereby it specifically identified Plaintiff, Betty Jean Freeman, as the victim of a sexual attack and related the details thereof. Such a publication was solely based upon the report made by Mrs. Freeman to the Sheriff's Department.

9. At all times material hereto, Plaintiff was a victim of a "sexual offense" within the purview of §794.03, Florida Statutes.

COUNT I

NEGLIGENT VIOLATION OF §794.03, FLORIDA STATUTES

10. Plaintiff realleges and incorporates herein paragraphs 1 through 8 and avers further that:

11. Because Plaintiff was a victim of a "sexual offense" within the purview of §794.03, Florida Statutes, Defendant, Sheriff of the City of Jacksonville, was under a statutory duty to refrain from causing or allowing to be published in an instrument of mass communication the "name, address or other identifying fact or information" of Plaintiff, Betty Jean Freeman, and Defendant, The Florida Star, Inc., was under a statutory duty to refrain from publishing in the mass media the "name, address or other identifying fact or information" of Plaintiff, Betty Jean Freeman.

12. The Defendant, Dale Carson, Sheriff of Jacksonville, negligently violated §794.03 by releasing information that caused or allowed the Defendant, The Florida Star, to publish same when Defendant, Dale Carson, Sheriff of Jacksonville knew or should have known that Defendant, The Florida Star, would publish the information released by Defendant, Dale Carson, Sheriff of Jacksonville.

13. As a proximate result of the negligence by Defendant, Dale Carson, Sheriff of Jacksonville, Plaintiff was caused to suffer an invasion of her privacy, mental anguish, shame and humiliation, and emotional pain and suffering. These injuries are continuing and will be suffered in the future.

WHEREFORE, Plaintiff sues Defendants for compensatory damages in excess of Ten Thousand Dollars ($10,000.00), together with costs and demands trial by jury of all issues triable as of right by a jury.

COUNT II

COMPENSATORY AND PUNITIVE DAMAGES
(The Florida Star, Inc.)

14. Plaintiff realleges and incorporates herein paragraphs 1 through 11 above and avers further that:

15. Defendant, The Florida Star, intentionally, and with reckless indifference towards Plaintiff and Plaintiff's emotional well-being, violated §794.03, Florida Statutes, by publishing Plaintiff's name, address and other identifying facts or information and stating that Plaintiff had been the victim of a sexual battery.

16. As a proximate result of the actions of Defendant, The Florida Star, Inc., Plaintiff was caused to suffer an invasion of her privacy, mental anguish, shame and humiliation, and emotional pain and suffering. These injuries are continuing and will be suffered in the future.

17. The actions of Defendant, The Florida Star, Inc., constituted such outrageous conduct that was so recklessly indifferent to Plaintiff's peace of mind and right of privacy so as to render it subject to the assessment of punitive damages.

WHEREFORE, Plaintiff sues Defendants for compensatory damages, plus punitive damages, in excess of Ten Thousand Dollars ($10,000.00), together with costs and demands trial by jury of all issues triable as of right by a jury.

DATED this 19 day of November, 1984.

Beckham, McAliley & Schulz, P. A.
3131 Independent Square
One Independent Drive
Jacksonville, Florida 32202
Telephone: 904/354-9022
Attorneys for Plaintiff

By /s/ R. J. Beckham
R. J. Beckham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Complaint has been furnished by U. S. Mail this 19 day of November, 1984, to Grady W. Martin, Esquire, General Counsel's Office, City of Jacksonville, 703 City Hall, Jacksonville, Florida, 32202, Attorney for City of Jacksonville and to Denise M. Prescod, Esquire, 255 North Liberty Street, Jacksonville, Florida, 32202, Attorney for The Florida Star.

/s/ R. J. Beckham
R. J. Beckham

IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Case No. BK-253

THE FLORIDA STAR,
Appellant,

v.

B. J. F.,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Florida Star hereby appeals to the Supreme Court of the United States from the December 15, 1986 judgment of this court, which affirmed the trial court's judgment validating the constitutionality of Section 794.03, Florida statutes. The Supreme Court of Florida denied Appellant's Petition for Discretionary Review on May 28, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ George K. Rahdert
George K. Rahdert, Esquire
Bonita M. Riggens, Esquire
Rahdert, Acosta & Dickson, P.A.
233 Third Street North
St. Petersburg, Florida 33701
(813) 823-4191
Attorneys for Appellant

Notice of Appeal filed in the Florida First District Court of Appeal and the Supreme Court of Florida on August 24th, 1987.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to ROBERT A. BUTTERWORTH, Attorney General, The Capitol, Tallahassee, Florida 32301, R. J. BECKHAM, ESQUIRE, 3131 Independent Square, Jacksonville, Florida 32202, JOEL D. EATON, ESQUIRE, Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Attorneys for Appellee on this 21st day of August, 1987.

/s/ George K. Rahdert
George K. Rahdert, Esquire
Bonita M. Riggens, Esquire
Rahdert, Acosta & Dickson, P.A.
233 Third Street North
St. Petersburg, Florida 33701
(813) 823-4191
Attorneys for Appellant

EXCERPT FROM THE FLORIDA STAR'S OCTOBER 29, 1983 "POLICE REPORTS"

B. . . J. . . F. . . reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60¢, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence. (GNM)

MOTION

Supreme Court, U.S.
FILED
OCT 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM

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Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

42pp

QUESTIONS PRESENTED

The motion to dismiss presents two threshold jurisdictional questions:

(1) WHETHER THE APPEAL IS UNTIMELY, WHERE THE JUDGMENT OF THE DISTRICT COURT OF APPEAL WAS THAT OF THE HIGHEST COURT IN FLORIDA FROM WHICH A DECISION COULD BE HAD, AND THE APPEAL WAS TAKEN MORE THAN 90 DAYS AFTER THE JUDGMENT WAS ENTERED.

(2) WHETHER THE APPEAL IS WITHIN THE COURT'S JURISDICTION, WHERE THE VALIDITY OF THE STATE STATUTE CHALLENGED HERE WAS NEITHER DRAWN INTO QUESTION WITH THE REQUISITE SPECIFICITY NOR EXPRESSLY PASSED ON BELOW.

A separate question is presented on the merits. In a tortured effort to force this case to fit within the rationale of *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the appellant has omitted a critical aspect of the statutory background of the case from its statement of that question. This case is not controlled by *Cox;* it involves an issue expressly left open in *Cox*—and it is therefore necessary that we restate the question presented on the merits here as follows:

(3) WHETHER THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A STATE FROM EXTENDING A CAUSE OF ACTION FOR DAMAGES FOR INVASION OF PRIVACY CAUSED BY PUBLICATION OF THE NAME OF A RAPE VICTIM, WHERE THE NAME WAS OBTAINED FROM A POLICE REPORT EXPLICITLY MADE CONFIDENTIAL BY STATUTE, AND WAS NEGLIGENTLY PUBLISHED THEREAFTER IN VIOLATION OF AN ADDITIONAL STATUTE MAKING ITS PUBLICATION A CRIME.

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No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM

The appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the District Court of Appeal of Florida, First District, on the grounds that (1) the appeal is untimely; (2) the appeal is not within the Court's jurisdiction; and/or (3) the question presented on the merits is so insubstantial as to require no further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the appellant's Jurisdictional Statement. the following constitutional and statutory provisions are relevant here:

Article V, §3(b), Fla. Const.

28 U.S.C. §2101(c)

28 U.S.C. §1257(2)

Section 119.011, Fla. Stat. (1983)
Section 119.07, Fla. Stat. (1983)
U.S. S. Ct. Rule 11.3
Rule 1.480(b), Fla. R. Civ. P.

Pertinent portions of these provisions are set forth verbatim in the appendix.

STATEMENT OF THE CASE

We are unable to accept the appellant-newspaper's Statement of the Case, because it is misleading and incomplete. Indeed, it would appear to be purposefully designed to conceal several critical aspects of the case from the Court—aspects which clearly make it an altogether different case than the cases upon which the appellant ultimately bottoms its argument on the merits. It is therefore necessary to restate the case briefly.

As the Court is now aware, B. J. F. suffered the ultimate outrage and invasion of her personality when she was raped at knifepoint on October 20, 1983 (SR. 2; T. 26).[1] She thereafter reported the rape to the office of the Sheriff of Jacksonville, Florida, which duly prepared a "police report" of the incident (T. 27, 109-12). The police report was a "public record" only in the sense that it was a document prepared by a governmental agency in the course of its official business. Section 119.011(1), Fla. Stat. (1983). The report was not a "public record" in the sense that it was available for inspection by the public; indeed, §119.07(3)(h), Fla. Stat. (1983), expressly made the report confidential and exempted it from the public disclosure requirements of Florida's "Public Records Act".

1. R.: Record on appeal.
SR.: Supplemental record on appeal.
T.: Separately paginated transcript of trial testimony contained in record on appeal.

Nevertheless, the Sheriff's office inadvertently allowed the newspaper access to the report, and it was copied verbatim by one of the newspaper's reporters (T. 109-12). As we shall explain in more detail *infra*, as a matter of state law, the newspaper was charged with notice of the statutory confidentiality of the report; it was prohibited from copying the confidential portions of it; and its conduct in copying the confidential portions of the report was not rendered "lawful" merely because the report had been inadvertently unprotected by the governmental agency charged with protecting its confidentiality.

Thereafter, B. J. F. suffered the ultimate invasion of her privacy when the newspaper published an account of the rape, identifying her by name as the victim. Jurisdictional Statement, A14. The publication of her name violated an additional statute prohibiting publication of a rape victim's name and providing criminal penalties for doing so—§794.03, Fla. Stat. (1983). Understandably upset at this double-violation of the unambiguous state laws intended to protect her constitutional, statutory, and common law right of privacy, B. J. F. filed suit against both the newspaper and the Sheriff (R. 2). Her amended complaint sought compensatory damages from both the newspaper and the Sheriff for violation of §794.03 and the consequent "invasion of her privacy" (R. 11). Count II of her amended complaint alleged that the newspaper's conduct in publishing her name was intentional, or recklessly indifferent, and sought an award of punitive damages against the newspaper (R. 11).

The newspaper responded with a motion to dismiss the amended complaint, which did not specifically challenge the constitutionality of §794.03, but asserted only generally that the plaintiff's complaint stated no cause of action because the newspaper's conduct was protected

by the United States Constitution (R. 17).[2] The motion to dismiss was simply denied, without elaboration (R. 19). Jurisdictional Statement, p. 3, n. 3. The newspaper thereafter answered the amended complaint, generally denying liability, and asserting no constitutional defenses (R. 20). B. J. F. subsequently settled her action against the Sheriff (T. 82), and her action against the newspaper was thereafter tried to a jury (T. 1). At trial, the newspaper was allowed to file an amended answer (T. 9); like the prior motion to dismiss, the amended answer did not specifically challenge the constitutionality of §794.03, but asserted only generally that the newspaper's conduct was protected by the United States Constitution (SR. 1).[3]

At trial, the plaintiff, a nurse's assistant with four children, testified that she had reported the rape to the police, and that the newspaper's report of it was unfortunately accurate (T. 26-27, 36). She first learned of the newspaper article when a fellow worker brought it to her while she was in the hospital recovering from the assault (T. 27). She had heard about the article from others many times, and as recently as three weeks before trial (T. 27-28, 33). The plaintiff's testimony reflects that her phone number was listed in the telephone directory, together with her address (T. 28-29, 65-66;

2. ". . . Said statutory section being criminal in nature, it is an improper allegation in plaintiff's civil cause of action. . . . Further, this defendant . . . is entitled to the privileges and protections of the First Amendment of the United States Constitution applicable to the State through the 14th Amendment of the United States Constitution. Thus, Plaintiff fails in its [sic] Amended Complaint to state a cause of action."

3. "Defendant further defends and alleges that the information was made freely available without restriction to the Defendant and to restrain Defendant from publication is violative of the 1st and 14th Amended [sic] of the United States Constitution."

plaintiff's exhibit 2). Shortly after her rape, while she was hospitalized and her mother was staying at her home to take care of the children, her mother received a telephone call from a man who stated that he would rape her again; the man called two or three times (T. 30, 42). The plaintiff testified that she was extremely upset by the publicity and the phone calls; that she had been forced to request police protection; that she had been forced to change her telephone number; and that she had ultimately been forced to change her residence out of fear of the caller and the other publicity arising from the newspaper's publication of her name (T. 29-32, 37). The plaintiff also required mental health counseling for her emotional distress at the unwanted publicity (T. 32, 38).

The newspaper's side of the story was placed in evidence by three witnesses. The reporter trainee who obtained the information was Jacqueline Lotson (T. 50, 108). Her job was to copy police reports which were made available in the Sheriff's "press room" (T. 108-09). She acknowledged that the Sheriff had posted a sign in the press room stating that it was against the law to publish the name of the victim of a sexual battery (T. 113, 116). She also acknowledged that she was aware of her newspaper's policy against publishing the names of rape victims (T. 115).

Ms. Lotson also acknowledged that she knew she was not supposed to copy the name of a rape victim from a police report. Since the newspaper has conveniently ignored this damaging admission, we quote it in full so there can be no question here that the newspaper knew that the identity of B. J. F. was supposed to have been confidential:

> Q. Did you get any understanding that it meant that you weren't allowed to take down that information?

A. Right.

Q. Excuse me?

A. I mean, yes, I understood that.

Q. You understood you were not supposed to take down the information from the police department?

A. Yes.

(T. 117).[4] Notwithstanding this knowledge, Ms. Lotson made a verbatim copy of the police report, and provided it to a staff writer at the newspaper (T. 109-12).

The staff writer who drafted the story from the reporter's copy of the police report testified that both the ethics of her profession and the policy of the newspaper prohibited the publication of a rape victim's name; that she was aware of this at the time she wrote the story; that, although she did intend that the story she wrote be printed, she did not intend that B. J. F.'s name be printed; and that she had made an error in putting her name in the story (T. 88-89, 100-01). Her explanation—that she viewed the crime merely as a robbery—was effectively impeached by the fact that the newspaper article itself rather graphically reveals that the plaintiff was raped.

The newspaper's owner, publisher, and managing editor testified that it was his newspaper's policy not to print the names of rape victims; that many newspapers have the same policy; and that all his employees had

4. Ms. Lotson later attempted to recant this admission (T. 118-20). However, it is settled under Florida law that, in such a circumstance, the recantation does not eliminate the admission; instead, the jury can credit the original testimony and disbelieve the recantation. *Burr v. State*, 466 So.2d 1051 (Fla.), *cert. denied*, 474 U.S. 879 (1985). *See Marks v. Delcastillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); *Wynne v. Adside*, 163 So.2d 760 (Fla. 1st DCA 1964).

been instructed upon the policy (T. 47-48, 51). He acknowledged that not only had Ms. Lotson and the staff writer violated that policy, but that a number of additional persons in the supervisory chain had missed the error and violated the policy—the article's editor, the typesetter, the proofreader and the news editor (T. 52-58). He had no explanation for the violation other than to concede that his employees had made "a mistake", that the error had "[j]ust slipped by", and that his news editor had "neglected to check [the article] properly" (T. 57-58).

At the close of the plaintiff's case and at the close of all the evidence, the newspaper moved for a directed verdict, raising (for the first time ever in the litigation) a specific challenge to the constitutionality of §794.03 (T. 67-85, 122-35). These motions were denied, and the trial court specifically held the statute constitutional as applied to the facts in the case (T. 85-86, 135). *See* Jurisdictional Statement, p. 4, n. 4. (Although this type of specificity is ordinarily sufficient to support this Court's appellate jurisdiction under 28 U.S.C. §1257(2), the newspaper's specific challenge was later waived in this case, as we shall explain in the argument which follows.) Following denial of the newspaper's motions, the plaintiff moved for a directed verdict on liability for compensatory damages. Counsel contended that §794.03 established the minimum standard of care in the circumstances; that its violation was negligence *per se;* and that its violation had been admitted (T. 135-36). The trial court granted the motion, and ultimately instructed the jury that the newspaper had negligently invaded B. J. F.'s privacy as a matter of law (T. 168).[5]

5. *See DeJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973) (holding that violation of a statute de-

(Continued on following page)

The jury returned a verdict awarding the plaintiff $75,000.00 in compensatory damages, and assessing $25,000.00 in punitive damages against the newspaper (T. 175). The verdict was reduced to judgment (R. 21), and an amended final judgment (reflecting a setoff for the plaintiff's settlement with the Sheriff) was ultimately entered against the newspaper in the amount of $97,500.00 (R. 22). Shortly thereafter, the newspaper filed a motion for new trial, a motion for remittitur, and a motion for judgment in accordance with its prior motion for directed verdict; the latter motion stated no specific grounds, but merely renewed by reference the "motion for directed verdict at the close of the evidence on the grounds then stated" (R. 23-27). Simultaneously with the filing of these motions, the newspaper filed a notice of appeal directed to the amended final judgment (R. 28). In a subsequent order, the trial court expressly stated that it did not rule upon the newspaper's post-trial motions, because it had been divested of jurisdiction to rule upon the motions by the simultaneously-filed notice of appeal (SR. 5).

On appeal to the District Court of Appeal of Florida, First District, the newspaper framed the issue which it

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Footnote continued—

signed to protect a particular class of persons from a particular type of harm is negligence as a matter of law). Contrary to the newspaper's insistence here that the plaintiff's cause of action derived from the criminal statute and that it was held "strictly liable", the cause of action was treated throughout the proceeding as a common law action for negligent invasion of privacy, and the statute was utilized simply as a legal definition of the minimum standard of reasonable care required under the circumstances. We mention the difference simply to assure the Court that negligence was proven below, in the event that the requirements of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply by analogy to this invasion of privacy case. This particular issue was never raised by the newspaper below, however, so the Court need not address it.

has attempted to bring here in only general terms.[6] Nowhere in its initial appellant's brief did it specifically assert that §794.03 was unconstitutional as applied to the facts of this case. The specific challenge was finally raised in the newspaper's reply brief, but this was too late for consideration by the district court of appeal, as we shall explain in the argument which follows. The decision which was rendered thereafter on December 15, 1986, contains two brief holdings. First, the court concluded that the newspaper had abandoned its post-trial motions by simultaneously filing its notice of appeal. Second, on the issue in contention here, the district court concluded as follows:

> Reaching the merits, we find that the information published, the rape victim's name, was of a private nature and not to be published as a matter of law. *See Doe v. Sarasota-Bradenton Florida Television Company, Inc.*, 436 So.2d 328, 330 (Fla. 2d DCA 1983), particularly the reference to Opinion 075-203 of the Attorney General of Florida (July 14, 1975), which suggests that Section 794.03, Florida Statutes, be applied to the prosecution of parties publishing non-public information. Accordingly, we affirm.

The Florida Star v. B. J. F., 499 So.2d 883, 884 (Fla. 1st DCA 1986), *review denied*, 509 So.2d 1117 (Fla. 1987) (footnote omitted). (Because it will be relevant to an argument which we shall make *infra*, the Court should note that this decision does not expressly declare §794.03 valid, as against a challenge to its constitutional validity.)

The newspaper thereafter filed a motion for rehearing, a motion for rehearing en banc, and a request for

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6. "Whether or not it is a violation of the 1st and 14th Amendment to hold a newspaper fully liable for the accurate publication of the name of a rape victim lawfully obtained from a police report." Brief of appellant, p. 3.

certification of the case to the Florida Supreme Court for further review. The motions were denied on January 23, 1987. Jurisdictional Statement, A4. The newspaper did not appeal the decision to this Court within 90 days thereafter, however. Instead, notwithstanding that the Florida Supreme Court had *no jurisdiction* to review the decision of the district court of appeal (as we shall explain in the argument which follows), the newspaper sought discretionary review in that court. Review was denied by the Florida Supreme Court on May 28, 1987. Jurisdictional Statement, A1. The notice of appeal to this Court was filed on August 24, 1987—88 days after the Florida Supreme Court denied review, but approximately seven months after the decision of the district court of appeal became final on January 23, 1987. Jurisdictional Statement, A12.

ARGUMENT

1. The appeal is untimely, because the judgment of the district court of appeal was that of the highest court in Florida from which a decision could be had, and the appeal was taken more than 90 days after the judgment was entered.

The conjunction of 28 U.S.C. §§1257(2) and 2101(c) required the newspaper to appeal from the judgment of "the highest court of a State in which a decision could be had", within "ninety days after the entry of such judgment". The newspaper apparently considered that the "highest court" in Florida "in which a decision could be had" in this case was the Florida Supreme Court, since it filed its notice of appeal on the 88th day after that court denied its petition for review of the decision of the district court of appeal. If the Florida Supreme Court had possessed jurisdiction to review the district court's decision,

then the newspaper would have been required to exhaust that potential remedy, and its appeal would have been timely. *See Stratton v. Stratton,* 239 U.S. 55 (1915); *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923); *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954); *Gotthilf v. Sills,* 375 U.S. 79 (1963); *Dresner v. Tallahassee,* 375 U.S. 136 (1963); *Dresner v. Tallahassee,* 378 U.S. 539 (1964).

It is our position, however, that the Florida Supreme Court had no jurisdiction whatsoever to review the district court's decision, so the "highest court" in Florida "in which a decision could be had" in this case was the district court of appeal. *See Nash v. Florida Industrial Commission,* 389 U.S. 235, 237 n. 1 (1967) (where Florida Supreme Court had no jurisdiction to review decision of district court of appeal because nature of district court's decision precluded further review, the district court of appeal was the "highest court in Florida wherein a decision could be had as required by 28 USC §1257(3)."). *Accord, Williams v. Florida,* 399 U.S. 78 (1970); *Palmore v. Sidoti,* 466 U.S. 429 (1984); *Florida v. Rodriguez,* 469 U.S. 1 (1984).

If we are correct about that, the newspaper was required to file its notice of appeal within 90 days of January 23, 1987—the date upon which its post-decision motions were denied by the district court of appeal. Supreme Court Rule 11.3. The notice of appeal was not filed within that time, however, so the appeal is untimely and should be dismissed. *See Department of Banking v. Pink,* 317 U.S. 264 (1942); *Federal Trade Commission v. Minneapolis Honeywell Regulator Co.,* 344 U.S. 206 (1952). *Cf. Matton Steamboat Co. v. Murphy,* 319 U.S. 412 (1943).

We believe we are correct that the Florida Supreme Court had *no jurisdiction* to review the district court's

decision. Unlike the authority possessed by this Court and the highest courts of most states, the Florida Supreme Court does not have broad supervisory power over its lower courts, nor does it have unfettered discretion to review the decisions of those courts. Instead, its jurisdiction is constitutionally limited to a handful of narrowly-defined classes of lower court decisions. *See Florida v. Rodriguez, supra* (J. Stevens, dissenting); *Jenkins v. State,* 385 So.2d 1356 (Fla. 1980). To the extent pertinent here, Article V, §3(b) of the Florida Constitution provided the Florida Supreme Court with jurisdiction to review the decision of the district court of appeal *only* if one of the following conditions had been met: (1) the district court had certified its decision for further review; (2) the district court's decision had "expressly declare[d] valid a state statute"; (3) the district court's decision had "expressly construe[d] a provision of the state or federal constitution"; or (4) the district court's decision had "expressly and directly conflict[ed] with a decision of another district court of appeal or of the supreme court on the same question of law".

In our judgment, none of those conditions for further review were even arguably met by the district court's decision in this case. The first was clearly not met, since the district court declined the newspaper's request to certify its decision for further review. Neither were the second or third conditions even arguably implicated by the district court's decision. Although a construction of the federal constitution and a determination of the validity of §794.03 may well have been *implicit* in the *result* which the district court reached, that was not enough to create jurisdiction in the Florida Supreme Court. That court has read its constitutional jurisdiction narrowly, and has made it clear that its jurisdiction depends solely upon the language selected by the district

court and expressed on the face of the decision sought to be reviewed—and that the word "expressly" (which qualifies each constitutional basis for the exercise of discretionary review, except where a decision has been "certified" for further review) means precisely what it says. *See Jenkins v. State,* 385 So.2d 1356 (Fla. 1980); *Dodi Publishing Co. v. Editorial America, S.A.,* 385 So.2d 1369 (Fla. 1980); *School Board of Pinellas County v. District Court of Appeal,* 467 So.2d 985 (Fla. 1985); *Reaves v. State,* 485 So.2d 829 (Fla. 1986). Inarguably, the district court's decision contains neither an *express* declaration of the validity of a state statute nor an *express* construction of a provision of the state or federal constitution—and it is therefore simply beyond debate that the Florida Supreme Court had no jurisdiction to review the district court's decision on either basis.

The remaining jurisdictional basis asserted by the newspaper below (but not reiterated in its Jurisdictional Statement here)—an "express and direct conflict" with a decision of another district court of appeal or of the supreme court on the same question of law—also provided no jurisdiction, because no such "express and direct conflict" existed. Florida's decisional law contains only two decisions even arguably dealing with the "same question of law": *Williams v. New York Times, Inc.,* 462 So.2d 38 (Fla. 1st DCA 1984), and *Doe v. Sarasota-Bradenton Florida Television Co., Inc.,* 436 So.2d 328 (Fla. 2nd DCA 1983). *Williams* need not be examined by the Court for "conflict", however, because it is a decision of the *same* district court of appeal, not "*another* district court of appeal"—and the Florida Supreme Court clearly has no jurisdiction to review *intra*district conflicts of that sort, even where such conflicts exist. *See In Re Rule 9.331,* 416 So.2d 1127 (Fla. 1984). *Williams* can

therefore safely be ignored in deciding the jurisdictional issue presented here.

The only remaining question is whether the newspaper had any arguable basis for asserting "express and direct conflict" with *Doe v. Sarasota-Bradenton Florida Television Co., Inc., supra.* That determination must be made by comparing the *face* of the two decisions alone. *See Reaves v. State, supra.* When that comparison is made, it will be perfectly clear that the two decisions are consistent in every respect, and not even arguably in express and direct conflict. *Doe* holds simply—as this Court required in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)—that the First Amendment protects the publication of the name of a rape victim, where the name is learned *in an open court proceeding. Doe* goes on to address the question left open in *Cox,* however, and observes (by quoting an Attorney General's Opinion) that the First Amendment would not protect the publication of the name of a rape victim obtained from "nonpublic information". 436 So.2d at 330. In the instant case, as the face of the district court's decision expressly reflects, the defendant obtained the plaintiff's name from "nonpublic information" protected by statute, not from a public record open to public inspection. The district court's decision is therefore perfectly consistent with *Doe* —indeed, it *follows Doe,* and is bottomed directly upon it—and it is therefore not even arguably in "express and direct conflict" with it. In short and in sum, the nature of the district court's written opinion in this case inarguably precluded further review in the Florida Supreme Court, and the district court was therefore the "highest court" in Florida "in which a decision could be had" in this case.

We recognize that, to reach this conclusion, this Court must undertake to determine a question of state law

which it would probably prefer to leave to the Florida Supreme Court. As the four decisions cited at the outset of our argument (*Nash, Williams, Palmore* and *Rodriguez*) make clear, however, this Court has not shirked that obligation in the past. Neither do we think that the responsibility can be avoided here, as long as this Court's jurisdiction depends upon federal statutes which circumscribe that jurisdiction by requiring that an appeal be perfected from the judgment of "the highest court of a State in which a decision could be had", within "ninety days after the entry of such judgment".[7] Finally, we should note that, if there is any doubt on the issue presented here, it is open to this Court to certify the question of the Florida Supreme Court's jurisdiction to that court for an answer to the threshold issue presented here. *See Dresner v. Tallahassee,* 375 U.S. 136 (1963); Article V, §3(b)(6), Florida Constitution; Rule 9.150, Fla. R. App. P.

We continue to insist, however, that there can be no doubt about the fact that the Florida Supreme Court had no jurisdiction whatsoever to review the district court's decision; that the district court's decision was therefore the judgment of the "highest court" in Florida "in which a decision could be had"; that the newspaper was therefore obliged to appeal to this Court within 90 days of the date the district court's decision became final on January 23, 1987; and that, because this appeal was not timely filed within that period, it should be dismissed.

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7. In anticipation of the newspaper's possible suggestion in reply—that the Court abandon its prior procedure and simply require that review be sought in the Florida Supreme Court as a precondition to an appeal to this Court, to save the Court the necessity of determining the state law jurisdictional issue itself—we would note simply that such a procedure would encourage (indeed, *require,* in many cases) that litigants pursue frivolous proceedings in the Florida Supreme Court, at the expense of both the Florida Supreme Court and this Court's own appellate jurisdiction.

2. The appeal is not within the Court's jurisdiction, because the validity of the state statute challenged here was neither drawn into question with the requisite specificity nor expressly passed on below.

The appeal should be dismissed for an additional reason: the validity of §794.03, Fla. Stat. (1983), was not drawn into question by the newspaper with the requisite specificity below, and was not expressly passed on below. As we noted in our statement of the case, the newspaper's motion to dismiss the plaintiff's amended complaint, the affirmative defense contained in the newspaper's answer to the amended complaint, and the issue presented by the newspaper on appeal did not assert that §794.03 was unconstitutional as applied to the facts in the case; instead, each asserted only generally that the plaintiff's cause of action could not be maintained because the newspaper's conduct was protected by the federal constitution. This thrice-asserted general position clearly lacked the requisite specificity to allow invocation of this Court's appeal jurisdiction under 28 U.S.C. §1257(2). *See Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980); *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983); *Calder v. Jones*, 465 U.S. 783 (1984). *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The newspaper did challenge the validity of §794.03 with the requisite specificity in the motions for directed verdict which it made at trial, and it obtained an explicit ruling on the constitutionality of the statute from the trial court in response. If that challenge had been preserved for review in the district court of appeal, and had been asserted there, this Court would arguably have

had jurisdiction to entertain the newspaper's appeal. That specific challenge was not preserved for review, however. In Florida, as in the federal system, the denial of a motion for directed verdict during trial is not a denial; it is, as a matter of law, a reservation of decision until after trial, requiring the post-trial filing of a motion for judgment in accordance with the prior motion for directed verdict. Rule 1.480(b), Fla. R. Civ. P.[8] The newspaper filed such a motion, but it never obtained a ruling upon it; instead, as the district court of appeal squarely held below, the motion was abandoned by the newspaper when it filed its notice of appeal.

Because the specific challenge was abandoned, of course, it could not have been entertained by the district court of appeal. Moreover, as we have previously noted, the specific challenge was not asserted in that court in the newspaper's initial brief in any event; only the general contention was raised as an issue on appeal, and the district court was therefore limited in its consideration of the appeal to that issue, as framed. *See Singer v. Borbua*, 497 So.2d 279 (Fla. 3rd DCA 1986), *review dismissed*, 503 So.2d 328 (Fla. 1987); *Rodriguez v. State*, 502 So.2d 18 (Fla. 3rd DCA 1987).[9] The abandoned

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8. The comparable federal rule is Rule 50(b), Fed. R. Civ. P., and it is thoroughly settled that the failure to file a Rule 50(b) motion for judgment after trial waives the legal point asserted in the motions for directed verdict made during trial. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1947); *Johnson v. New York, New Haven & Hartford Railroad*, 344 U.S. 48 (1952).

9. The issue was asserted with the requisite specificity in the appellant's reply brief. It is settled in Florida, however, that an issue raised for the first time in a reply brief cannot and will not be considered by an appellate court. *See, e. g., Shee-Con, Inc. v. Al Seim Appraisal Service, Inc.*, 427 So.2d 311 (Fla. 5th DCA 1983); *Zerwal v. State Farm Mutual Automobile Insurance Company*, 332 So.2d 645 (Fla. 3rd DCA 1976);

(Continued on following page)

point therefore provides no foundation for an appeal to this Court. *See Beck v. Washington*, 369 U.S. 541 (1962); *Wolfe v. North Carolina*, 364 U.S. 177 (1960). *Cf. Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Notwithstanding all of the foregoing, of course, this Court would have jurisdiction to entertain the newspaper's appeal if the decision of the district court of appeal had expressly upheld the constitutionality of §794.03. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The district court's decision contains no such express declaration, however. And from all that appears in the decision, the district court simply rejected the only issue raised by the newspaper in its initial brief—its general contention that the plaintiff's cause of action could not be maintained in the face of the federal constitution. *Cox* is therefore of no assistance to the newspaper, and the appeal should be dismissed for lack of jurisdiction.[10]

3. The question presented on the merits is so insubstantial as to require no further argument.

If the Court has jurisdiction of the appeal, we respectfully submit that the question presented on the merits

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Footnote continued—
Pursell v. Sumter Electric Co-Operative, Inc., 169 So.2d 515 (Fla. 2nd DCA 1964); *St. Regis Paper Co. v. R. D. Hill*, 198 So.2d 365 (Fla. 1st DCA 1967).

10. The Court has the authority to treat the improvident appeal as a petition for writ of certiorari under 28 U.S.C. §§1257 (3) and 2103. If we are correct as to the untimeliness of the appeal, however, certiorari must also be denied for untimeliness —since 28 U.S.C. §2101(c) imposes a 90-day filing requirement upon both types of proceedings. If the Court should determine that the notice of appeal was timely filed, and that it should be treated as a petition for writ of certiorari, we respectfully submit that certiorari should be denied for the reasons expressed in our argument upon the insubstantiality of the issue presented on the merits.

is so insubstantial as to require no extended argument, and that the appeal should be dismissed or the decision of the district court of appeal affirmed as a result. On the merits, the issue presented here is really a rather narrow one—and contrary to the insistence of the newspaper, it is not "controlled" in any fashion by any prior decision of this Court or any other court. The issue, properly framed on the facts most favorable to the verdict, is whether the First Amendment protects the press from civil actions for invasion of privacy involving the publication of a clearly private matter about a clearly private individual, where the information was obtained in violation of a statute requiring that its confidentiality be maintained and was published in violation of a statute prohibiting its publication. For the reasons which follow, we think the First Amendment, when balanced against the other important constitutional and statutory interests at stake here, contains no such license for the clearly tortious conduct of the newspaper on the facts in this case.

Before we turn to legal analysis of that issue, we think it is important to alert the Court to the fundamental flaw in the legal argument presented by the newspaper here—its repeated insistence that B. J. F.'s name was a matter of public record and therefore "lawfully obtained" by the newspaper. This contention is extremely important to the newspaper's position—indeed, it is pivotal to that position—because the result in this case will most likely turn squarely upon the propriety of this characterization of the facts. In our judgment, the newspaper has simply rewritten the facts in an effort to make them fit within the decisional law upon which it relies—and when the facts are straightened out, it will be clear to the Court that the lower court correctly balanced the competing interests at stake here.

The essential fact of the matter is that the plaintiff's identity as a rape victim, although contained on a document prepared by a governmental agency in the course of its official business, was not a matter of "public record" in the sense that it was available for inspection by the public. The Florida Public Records Act—specifically §119.07(3)(h), Fla. Stat. (1983)—expressly provided that the plaintiff's name was exempt from public disclosure, i. e., that it was to be kept confidential. Ms. Lotson admitted at trial that she knew that, but she copied the name anyway. The newspaper advanced a number of inventive arguments below to avoid the statutory confidentiality of the plaintiff's purloined name—arguing that the name, although confidential, was nevertheless a "public record", and arguing that only the sheriff had a duty to obey and assert the exemption and that the newspaper could freely ignore the statute if the sheriff ignored it—but those arguments amounted to little more than semantics.

Stripped of its semantics, the newspaper's argument amounted to no more than this—the press is not bound to respect valid state statutes protecting the confidentiality of information if the state itself fails actively to prevent a violation of the confidentiality provisions of the statute. Reduced to its further essentials, the argument says, in effect, that the press need not obey confidentiality laws if the state does not bother to enforce them (and if the state does not bother to enforce them, the press may thereafter violate a statutory prohibition against publication with impunity). The argument is preposterous enough on its face that its impropriety probably needs no extended discussion. It clearly overlooks the plaintiff's rights in the matter (which both statutes were cleary designed to protect), of course. And it renders the confidentiality aspect of the Florida Public Records Act vio-

lable at will, and completely meaningless as a result. If the newspaper is correct, then the press has a license to steal and publish statutorily protected material with impunity, and the state and its citizenry are helpless to do anything about it in any manner at all. The newspaper is not correct, however.

In a case nearly indistinguishable from this one on the legal issue presently under discussion, the District Court of Appeal of Florida, Second District, held that the right to inspect public records "does not apply to all public records since public policy require that some of them, although of a public nature, be kept secret and free from public inspection"; that a state employee's inadvertent failure to comply with a statute requiring certain information to be kept confidential did not authorize a newspaper to take and print the information; and that the newspaper's retrieval of the information in that fashion was not "lawful" merely because it was inadvertently unprotected by the state employee, since it was protected by a higher authority in the form of a state statute. *Patterson v. Tribune Co.*, 146 So.2d 623, 626 (Fla. 2d DCA 1962), *cert. denied*, 153 So.2d 306 (Fla. 1963). The court concluded:

> . . . The accredited news dispensing agencies of Florida are charged with knowledge of the statute. The fact that information which is not in the public domain has been obtained innocently does not license a publisher, charged with knowledge of the proscribed character of the information, to publish it further and thus compound the wrong.

Id. at 627. Of course, the lower court in this case reached the identical conclusion.

Neither *Patterson* nor the lower court's decision definitively answers the federal *constitutional* question raised by the newspaper here, but they certainly dispose

of the newspaper's contention that it could safely ignore its own knowledge of §119.07(3)(h)—actual, imputed, or otherwise—and "lawfully obtain" the plaintiff's name merely because a sheriff's employee may not have acted to enforce the law—and we submit that that is a question of state law which *has* been definitively resolved in this case. Clearly, basic common sense requires a conclusion that the newspaper had the same obligation to observe state law that the sheriff had, else the confidentiality provisions of the Public Records Act are simply meaningless. The law also requires that conclusion, because it is settled that the press has no right of access to information held by the government which is superior to that of the public itself. *See Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). If state confidentiality laws are to have any meaning at all, they must apply to everyone—including the press—and the newspaper's retrieval of the plaintiff's name in this case, because it clearly violated state confidentiality laws, must be deemed, at minimum and as a matter of settled state law, "unlawful".

Once it is understood that the plaintiff's identity as a rape victim was made confidential by law and that the newspaper's acquisition of it was in violation of that law and therefore "unlawful", the decisions relied upon by the newspaper as "controlling" here are readily distinguished. In fact, a brief analysis of the decisions will reveal that the issue presented here has been expressly left "open" by those decisions. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the centerpiece of the newspaper's argument, the defendant-television station obtained the identity of a rape victim in judicial proceedings "open to public inspection". The defendant urged this Court to hold that the First Amendment protected the publication of all truthful information, however obtained—which is essentially the position urged

upon this Court by the newspaper here. This Court declined this request, and narrowed the issue as follows:

> Those precedents, as well as other considerations, counsel similar caution here. In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the state may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

420 U.S. at 491.

The Court thereafter narrowly limited its holding, concluding that the First Amendment protects the press from liability for invasion of privacy resulting from publication of information obtained from records "open to public inspection", but it expressly left open the quite different question presented in the instant case—whether the First Amendment protects the press from liability for invasion of privacy resulting from statutorily-proscribed publication of private information obtained from statutorily-protected confidential records which are, by law, *not* "open to public inspection":

. . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. [Citation omitted].

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.

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26. We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

420 U.S. at 496-97. In the instant case, of course, the State of Florida *has* "responded" with a statute designed to prevent the exposure of rape victims' names, and the evidence reflects without dispute that the plaintiff's name

was obtained by the newspaper in violation of the statute. Because the issue presented here was expressly left open in *Cox, Cox* clearly is not "controlling" here.

A number of the additional decisions relied upon by the newspaper simply follow *Cox* on similar facts, and they are therefore inapposite here for the same reason. *E. g., Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977) (name of juvenile learned at court proceedings open to the public; no evidence that name acquired unlawfully or without State's approval); *Smith v. Daily Mail Publishing Co.,* 442 U.S. 97 (1979) (name of juvenile "lawfully" obtained by merely asking various witnesses; question of "unlawful press access to confidential" information expressly left open); *Ayers v. Lee Enterprises, Inc.,* 227 Or. 527, 561 P.2d 998, 86 A.L.R.3d 72 (1977) (name of rape victim learned from police, where no statute provided for confidentiality of information; court intimating that different result might be required by post-incident enactment of statute preserving confidentiality of rape victims' names).[11]

An additional decision of this Court relied upon by the newspaper is somewhat closer to the point, because it addresses the publication of information declared "confidential" by state law. In *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978), this Court was confronted with the following question:

> The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, in-

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11. *WXYZ, Inc. v. Hand,* 658 F.2d 420 (6th Cir. 1981), does not really fit within the line of authority deriving from *Cox,* because it involves the somewhat peculiar question of the constitutionality of a suppression order which clearly constituted an impermissible "prior restraint" upon the publication of the name of an accused *rapist.* We perceive that the question presented in this case—the availability of a civil remedy for the invasion of privacy of a rape *victim*—requires a considerably different analysis.

> cluding newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.

435 U.S. at 830. In answering the question, the Court did not conclude that the First Amendment protected all truthful publications, however obtained; instead, it resorted to a "balancing test", weighing the state's interest in confidentiality against the interests embodied in the First Amendment. It concluded that, because the qualifications of the judiciary were central concerns of a self-governing public, publication of information concerning judicial qualifications "lies near the core of the First Amendment"—435 U.S. at 838—and it held that First Amendment interests outweighed the state's interests in confidentiality on those facts.[12]

It is this type of "balancing test" which provides the appropriate jurisprudential mechanism for resolution of the instant case.[13] This Court's most recent foray into the field of press vs. privacy is particularly instructive here. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), which arose out of a defamation and invasion of privacy action by Rhinehart (and others) against the Seattle Times, the

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12. The remaining decisions upon which the newspaper has relied—which balance the privacy rights of potential *criminal defendants*, rather than the privacy rights of *victims*—belong in this category, in which the balance clearly tips in favor of the First Amendment interests. There is therefore no need to discuss them separately in the text.

13. *See, e. g., Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (criminal defendant's Sixth Amendment rights outweigh press's First Amendment rights, justifying closure of pre-trial suppression hearing); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (state's interest in protecting reputations of citizens outweighs First Amendment interests where speech does not involve matter of public concern).

newspaper sought pre-trial discovery of potentially embarrassing private information. The trial court ordered the plaintiff to comply with the discovery requests, but entered a protective order prohibiting the newspaper from publishing the private information obtained through the discovery process. The newspaper appealed, insisting (as the newspaper has insisted here) that the First Amendment gave it a license to publish anything which came into its hands, by whatever means. This Court balanced the privacy rights of the plaintiffs and the state's interests in the judicial discovery process against the newspaper's First Amendment rights, and held that the protective order, although a clear impingement on First Amendment rights, was fully justified by the more compelling privacy interests at stake, and therefore a proper limitation upon the First Amendment.

Because a "balancing" of the competing interests involved here is clearly required to determine whether the newspaper's First Amendment rights prevent enforcement of the plaintiff's privacy rights, we turn to that clearly necessary task. We begin with the plaintiff's rights. Those rights are clearly substantial. In the first place, there have been significant developments in the decisional law since *Cox* was decided, and it is now settled that the United States Constitution contains a constitutional right of privacy which protects against the disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981)

In addition, the plaintiff's common law right of privacy, which clearly encompassed the right to prevent disclosure of embarrassing private details of her life, has now been elevated to constitutional dimension by the

recent addition of a "right of privacy" to the Florida Constitution. Article I, §23, Fla. Const. *See Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985); *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533 (Fla. 1987); *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2nd DCA 1983). It also goes without saying that these constitutional rights of privacy are fully protected in the instant case by statute—specifically, the confidentiality exception to the Public Records Act and §794.03—both of which are strong expressions of the public policy of the State of Florida.

There are practical matters to be weighed in the balance as well. Because a sexual crime intrudes upon the most private area of a woman's personality, the publication of a rape victim's name is almost certain to cause acute embarrassment, humiliation, and shame—which is why it is prohibited as a matter of public policy. Publication of a rape victim's name may also subject the victim to follow-up harrassment by the rapist or others, as it did in this case, requiring the victim to change her residence and phone number, as it did in this case—and perhaps, in egregious cases, requiring the victim to change her job, identity, and the like. Clearly, non-disclosure of the identity of a rape victim is a socially desirable policy of the highest order and justification, which lies at the core of the constitutional right of privacy. Not even the newspaper has argued to the contrary.

To be balanced against these substantial interests is the newspaper's First Amendment right to print the news. In our judgment, that right is insubstantial on the facts in this case. The newspaper, borrowing from an offhand assertion in *Cox*, insists that a rape is a crime, and therefore a matter of "public interest" about which the public should be informed without fear of civil or criminal liability. We agree that the crime itself, and perhaps

even the identity of the assailant, are matters of public interest, but we cannot agree that the *identity* of the rape *victim* is a matter of any public interest at all. It can also fairly be asserted that the Florida legislature has determined, as a matter of public policy, that the identity of a rape victim is not a matter of legitimate public concern, since it has exempted such information from the Public Records Act and made its publication a crime. And, perhaps most importantly, the newspaper has more or less *conceded* that the identity of a rape victim is not of sufficient public interest to justify its publication, by conceding that the journalists' code of ethics, the newspaper's own policy, and the policies of most members of the media prohibit publication of a rape victim's name. Surely, if the media itself has determined that the public interest in learning the identity of a rape victim is insufficient to outweigh the substantial privacy interests of the victim, which is what the record in this case presently reflects, then this Court should have little difficulty in reaching the same conclusion.

We should also note that this Court has recently shifted its emphasis in this area, and matters of mere "public interest" are no longer the touchstone of First Amendment protection. Today, the touchstone of First Amendment protection is largely status-related—greater protection being afforded to the publication of information about public officials and public figures, lesser protection being afforded to the publication of information about private individuals, like the plaintiff in this case, and their private concerns, like the fact of her rape. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).[14] These

14. In addition, *see Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1970); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct.

(Continued on following page)

recent developments clearly require that something more than mere "public interest" be demonstrated to support the newspaper's position—and since the newspaper cannot even demonstrate minimal "public interest" in the publication at issue here, we respectfully submit that its First Amendment interests are negligible here.

We also respectfully submit that the "balancing test" required of this Court in this case will admit of only one defensible result: the plaintiff's substantial constitutional, statutory, and common law interests in avoiding disclosure and publication of her name far outweigh any chimerical interest (an interest which, in this case, the newspaper has itself disavowed by its own policy) which the newspaper might have in violating the statutes involved here and egregiously invading the plaintiff's privacy in the process. The district court of appeal correctly resolved that balance in the plaintiff's favor below, and if this issue is properly before the Court, its resolution of the balance should be affirmed.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed, or that the judgment of the District Court of Appeal of Florida, First District, should be affirmed.

Respectfully submitted,

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Footnote continued—
1558, 89 L. Ed. 2d 783 (1986). *See generally* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975).

APPENDIX

Article V, §3(b), Florida Constitution.

(b) JURISDICTION.—The supreme court:

. . .

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

28 U.S.C. §2101(c). Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . .

28 U.S.C. §1257(2). State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of

its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Section 119.011, Fla. Stat. (1983). Definitions.

For the purpose of this chapter:

(1) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.07, Fla. Stat. (1983). Inspection and Examination of Records; Exemptions.

(1)(a) Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee. . . .

. . .

(3)(a) All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from the provisions of subsection (1).

. . .

(h) Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of any sexual battery as defined by chapter 794 . . . is exempt from the provisions of subsection (1).

United States Supreme Court Rule 11.3. Appeal, Cross-appeal—time for taking.

3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

Rule 1.480(b), Fla. R. Civ. P. Motion for a Directed Verdict.

(b) Reservation of Decision on Motion. When a motion for a directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . .

REPLY

BRIEF

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

On Appeal From the First District Court of Appeal
for the State of Florida

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant, *The Florida Star,* hereby files its reply to Appellee's Motion to Dismiss or Affirm[1] as requested by this Court on October 30, 1987.

1. Appellee's Motion to Dismiss or Affirm is hereinafter cited as "MTD". Citations to the Appendix of Appellant's Jurisdictional Statement are identified as "(A .....)".

ARGUMENT

1. The Appeal Is Timely Because Appellant Was Required to Seek and Did Seek Discretionary Review in the Florida Supreme Court.

Appellant filed its notice of appeal from the judgment of "the highest court of a state in which a decision could be had" (the Florida Supreme Court) within "90 days after the entry of such judgment". 28 U.S.C. §§1257(2) and 2101(c). Appellant was required to seek discretionary review in the Supreme Court of Florida and therefore had ninety days from that court's order to file its notice of appeal.

If the availability of discretionary review by a higher state court exists, a party must seek to obtain the exercise of that discretion. *Stratton v. Stratton,* 239 U.S. 55 (1915) (a party must "invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this Court.") *Id.* at 56-57. As in *Stratton,* jurisdiction of the highest court was "not imperative, but gracious or discretionary, that is, depending upon its judgment. . . ." *Id.* at 56.

Where the highest court declines to exercise its discretionary authority, the state court judgment which is subject to discretionary review by the higher court becomes the judgment subject to review under 28 U.S.C. §1257. *See Interstate Circuit Inc. v. City of Dallas,* 390 U.S. 676, 678 n.1 (1968); *Minneapolis, St. P. & S.S.M.Ry. Co. v. Rock,* 279 U.S. 410, 412 (1929); *Virginian Ry. Co. v. Mullens,* 271 U.S. 220, 222 (1926); *Sullivan v. Texas,* 207 U.S. 416, 422 (1908).

When the highest state court has jurisdiction to review a decision of a lower state court but refuses to do so, the time runs from the date of the refusal to grant review, not the date of the lower court judgment. *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923). Therefore, for purposes of time computation under §1257 (2), Appellant's ninety day period began on May 28, 1987.

The Florida Supreme Court did have jurisdiction to consider the district court decision as evidenced by the language contained within its order and as supported by controlling case law. The pertinent phrases of the order are: "deemed necessary to reflect jurisdiction under Article V, Section 3(b) . . ." and "should decline to accept jurisdiction". (A1) Notably, the Court did not dismiss the petition for lack of jurisdiction, and the order specifically stated the court had declined to *accept* jurisdiction. The particular wording of that phrase is crucial, because it presupposes that the court did have jurisdiction.

Appellee's citations to support its argument that the "nature of the district court's decision precluded review" (MTD at 11) are clearly misplaced. Appellee's citations on this point involved a Florida district court of appeal decision which was "*per curiam* affirmed" without an accompanying written opinion. *See, Florida v. Rodriguez,* 469 U.S. 1 (1984); *Palmore v. Sidati,* 466 U.S. 429 (1984); *Williams v. Florida,* 399 U.S. 78 (1970); *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). Accordingly, in *Florida v. Rodriguez,* 469 U.S. at n.4, Justice Stevens' dissent correctly explained that, under the Florida Constitution, a district court decision rendered without any statement of reasons does not provide the Florida Supreme Court with jurisdiction to exercise its discretionary review. The district court's decision, although not lengthy,

was a written opinion accompanying the decision, which contained reasons for affirmance, citation to statute and legal principles upon which the decision was based. (A2-3) Accordingly, the "nature" of the decision did not preclude review by the Florida Supreme Court.

Appellant's Petition to the Florida Supreme Court[2] stated jurisdiction on the grounds of conflict, validation of a statute, and construction of constitutional[3] provisions. Amici The Florida First Amendment Foundation and The Miami Herald Publishing Company filed a jurisdictional brief in support of Appellant citing conflict.[4]

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2. Article V, §3(b) of the Florida Constitution states that the Florida Supreme Court: "(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

3. "I. THE FIRST DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH BOTH DECISIONS OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW; II. THE FIRST DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY DECLARED SECTION 794.03, FLORIDA STATUTES, TO BE VALID; III. THE FIRST DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY CONSTRUED PROVISIONS OF BOTH THE FLORIDA AND FEDERAL CONSTITUTIONS." (Appellant's Brief on Jurisdiction to the Florida Supreme Court at -i-)

4. "I. THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS HOLDING THAT THE TRUTHFUL PUBLICATION OF LAWFULLY OBTAINED INFORMATION IS NOT ACTIONABLE; A. Section 794.03 does not bar the publication of a rape victim's name where that name was not obtained by 'improper methods'; B. A criminal statute may not constitutionally impose a *per se* ban on the truthful publication of information; II. THE DECISION OF THE FIRST DISTRICT HOLDING THAT A RAPE VICTIM'S NAME IS 'OF A PRIVATE NATURE' IS IN EXPRESS

(Continued on following page)

Appellee erroneously claims that the term "expressly" under Article V, §3(b)(3) prohibited the Florida Supreme Court's accepting jurisdiction on the grounds of express validation, express construction, and also limited the determination of conflict to the only decision cited by the district court. (MTD at 12-13, 14) Appellee admits that a determination of the validity of Section 794.03 was "implicit in the result" which the district court reached (MTD at 12), therefore, the argument is obviously predicated upon the construction of the word "expressly". Appellee has failed to provide the Court with a definition of the terms "expressly", other than to state that it "means precisely what it says". (MTD at 13) A close reading of the sparse Florida case law which has defined this requirement reveals that the term "expressly" is directed to ensuring that there be a decision of the district court of appeal which accompanied by a written opinion, rather than a "*per curiam* affirmed" decision without any opinion. *See Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980).

Decisions have construed the term "expressly" within the context of conflict. In *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla. 1981), the Florida Supreme Court specifically stated "[i]t is not necessary that a district court *explicitly identify* conflicting district court or supreme court decisions in its opinion in order to create an 'express'

Footnote continued—

AND DIRECT CONFLICT WITH DECISIONS HOLDING THAT PUBLICATION OF THE NAME OF A CRIME VICTIM IS NOT AN INVASION OF PRIVACY; III. THE DECISION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS HOLDING THAT A CIVIL CAUSE OF ACTION CANNOT BE IMPLIED FROM A CRIMINAL STATUTE WHERE SUCH AN ACTION WOULD CONFLICT WITH EXISTING LEGAL REMEDIES." (Amici Brief on Jurisdiction to the Florida Supreme Court at -i-)

conflict. . . ." *Id.* at 1342. (Emphasis added) Furthermore, "*discussion . . . of the legal principles* which the court applied *supplies a sufficient basis* for a petition for conflict review." *Id.* (Emphasis added)

In one case where the Florida Supreme Court considered the term "expressly" under §3(b)(3) not within the context of conflict, the court stated that "expressly" meant "within the written district court opinion." *School Board of Pinellas County v. District Court of Appeal,* 467 So.2d 985 (Fla. 1985).[5]

Under Article V, §3(b)(3) of the Florida Constitution, the "expressly" requirement is fulfilled where there is a district court decision accompanied by a written opinion which discusses the legal principles which the court applied. *Accord, Florida v. Rodriguez,* 469 U.S. at 1 n.4 (a Florida district court of appeals decision does not "expressly" decide a constitutional question . . . where the decision was rendered "without a statement of reasons.") (Stevens, J., dissenting). This definition of "expressly" is clearly applicable to cases which allege express validation of a statute, express construction of a constitutional provision, and express and direct conflict. Significantly, three of the four cases Appellee cited to support its argument were cases which considered jurisdiction on the ground of conflict, not validation or construction. *See Reaves; Dodi; Jenkins.*

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5. The remaining cases cited by Appellee do not specifically address the meaning of "expressly". *See* Reaves v. State, 485 So.2d 829, 830 (Fla. 1986) (dissenting opinion cannot establish conflict; express and direct conflict means the conflict *must appear within the four corners of the majority decision*) (emphasis added); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980) (conflict not established by case cited in *per curiam* affirmed decision).

In this case, the district court rejected Appellant's constitutional challenge to §794.03 in a decision which was accompanied by a written opinion which expressly validated §794.03 and construed a provision of the federal constitution.

The same principles apply regarding the expressly requirement within the context of "express and direct conflict" with another district court of appeal or the Supreme Court on the same question of law. Therefore, Appellant and Amici were not limited and did not limit their jurisdictional argument to *Doe,* which was the only case cited by the district court. *Accord, Ford Motor,* 401 So.2d at 1342. Express and direct conflict exist between the district court's decision and that rendered in *Gardner v. Bradenton Herald, Inc.,* 413 So.2d 10 (Fla.), *cert. denied,* 459 U.S. 865 (1982) and *Doe v. Sarasota-Bradenton Florida Television Company, Inc.,* 436 So.2d 328 (Fla. Dist Ct. App. 1983).[6]

The salient facts in *Doe* were almost identical to the facts in this case. The *Doe* court based its affirmation of

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6. "The First District's ruling that B.J.F.'s name 'was of a private nature and not to be published as a matter of law' expressly and direcly conflicts with the Second District's recognition in *Doe* . . . that Florida's constitutional right to privacy provision 'must yield to the federal constitution's guarantee of press freedom." *Id.* at 330. "Both victims sued on the ground that Section 794.03 created an implied cause of action for its violation. The *Doe* court declined to apply the statute on the ground that the press obtained its information from a source already open to public view." (Appellant's Brief on Jurisdiction to the Supreme Court of Florida at 3)

"Although the decision of the First District purports to rely on *Doe* . . ., in fact, it expressly conflicts with it. . . . Since it is undisputed that *The Florida Star* did not engage in improper activity to obtain the Plaintiff's name, the decision of the First District applying §794.03 is an express and direct conflict with *Doe.*" (Amici Curiae to the Florida Supreme Court at 4-5)

the trial court's dismissal of the rape victim's cause of action based upon §794.03 on the authority of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The court specifically noted that "[in neither *Cox* nor *Doe*] was there any indication that the press used improper methods to obtain the information disclosed." *Doe*, 436 So.2d at 330. On amazingly similar facts, the district court created conflict with *Doe*. In this case, the district court's reliance on *Doe* was in direct conflict with *Doe*.

Appellant[7] and Amici[8] also demonstrated conflict with *Gardner*, 413 So.2d at 10, in which the Florida Supreme Court ruled a prior restraint statute unconstitutional. The breadth and totality of the prior restraint prohibition in

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7. "The First District's decision also directly and expressly conflicts with this Court's decision in *Gardner* . . ., in which this Court affirmed the trial court's ruling that a criminal statute prohibited publication of truthful information was an unconstitutional restriction on the freedom of the press. The Court held that the statute under consideration in *Gardner* was a prior restraint on the press, was overbroad, and lacked procedural safeguards which would allow a balancing of interests." (Appellant's Brief on Jurisdiction to the Supreme Court of Florida at 4)

8. "The decision of the First District interpreting Section 794.03 as an absolute ban on the truthful publication of a rape victim's name is also in express and direct conflict with *Gardner*. . . . In *Gardner*, this Court held unconstitutional a statute which 'direct[ed] without exception or procedural safeguards the criminal punishment of any person who truthfully publish[ed] without malice the name of an unindicted subject of interceptions or wiretaps.' *Id.* at 11. This Court struck down the statute because it provided 'no meaningful way' to balance the asserted interests and confidentiality against the First Amendment interests and disclosure. *Id.* at 12.

As interpreted by the First District, Section 794.03, like the unconstitutional statute in *Gardner*, would hold the press strictly liable in every instance for the truthful and non-malicious publication of information. The First District's affirmance of the damages award based on Section 794.03 thus conflicts directly with *Gardner*." (Amici Brief on Jurisdiction to the Supreme Court of Florida at 6)

§794.03 parallels that of the statute in *Gardner*, therefore, conflict was established.

The Florida Supreme Court has extremely broad discretionary power to determine whether to accept jurisdiction based upon conflict. In one case, the court found conflict based upon a footnote in one of their previous decisions. *White Construction Co. Inc. v. Dupont*, 455 So.2d 1026, 1028-1029 (Fla. 1984). Likewise, the court has also accepted jurisdiction "because the court below misapplied controlling case law to the facts of the case. . . ." *State v. Stacey*, 482 So.2d 1350 (Fla. 1985). The conflict between this case and *Doe* and *Gardner* was apparent "because the court below misapplied controlling case law to the facts of the case." *Stacey* at 1350.

The Florida Supreme Court had jurisdiction over the district court decision based upon the words of the Florida Supreme Court's order denying review, and the previous analysis of Florida case law.[9]

2. The Validity of Section 794.03 Was Specifically Drawn Into Question and Was Expressly Passed on by the Florida Courts.

Appellant explicitly and timely challenged §794.03 as repugnant to the Federal Constitution in the Florida courts. *See* Jurisdictional Statement at 3 n.3; *Cohen v. California*, 403 U.S. 15, 17 (1971). During the motion for directed verdict, Appellant specifically argued:

> [T]here are Constitutional grounds we would argue at this time, one dealing primarily with the statute

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9. Appellee admits that Appellant's appeal is timely if the Florida Supreme Court possessed jurisdiction to review the district court's decision. (MTD at 10-11)

itself. The statute, . . . 794.03 is a statute that provides criminal sanction or [sic] the accurate publication of the name, address or any identifying information of someone who is allegedly a victim of a sexual assault . . . [I]t is clearly [sic] from the way that it is written and there is no question about it that the statute would constitute prior restraint. . . . (Transcript 73-74)

[I]f even this Court deemed that there was a basis for the statute itself to be held constitutional in this matter before this Court that statute does not apply and the reason that statute does not apply is because the information was public, the information was accurate. . . . (Transcript at 79)

I do think we can safely say the statute then has not risen to the level where it should supercede the constitutional right my client has to freedom of the press and freedom to print information that he has gained by normal report of means legally and printed accurately [sic] . . . (Transcript at 81)

Appellant obtained an explicit ruling on the challenge to §794.03, as set forth at 4 n.4 of the Jurisdictional Statement. Appellant presented the issue to the district court as:

> It is a violation of the 1st and 14th Amendments to hold a newspaper civilly liable for the accurate publication of the name of a rape victim where that name is lawfully obtained from a police report. (Appellant's Initial Brief to the First District Court of Appeal at -i-)

Additionally, Appellant specifically argued:

> In *Cox*, the U.S. Supreme Court held that the First Amendment barred the imposition of liability through a civil action based on a Georgia statute virtually identical to *Section 794.03*, Florida Statutes, relied on by Appellees in this lawsuit. (Footnote omitted) (Emphasis added)
>
> The case at bar is a [sic] amazingly like *Cox* in that question here is *whether the state may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—but non-judicial public records.* (Appellant's Initial Brief to the district court at 5-6) (Emphasis added)

Likewise, Amicus The Florida First Amendment Foundation, challenged §794.03 in its Initial Brief.[10] Appellant[11]

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10. "A NEWSPAPER CANNOT BE HELD LIABLE FOR DAMAGES FOR THE INADVERTENT BUT TRUTHFUL PUBLICATION OF THE NAME OF AN ALLEGED RAPE VICTIM WHERE: (A) THE VICTIM REPORTED THE CRIME TO THE POLICE AND; (B) THE POLICE RELEASED THE INFORMATION TO THE NEWSPAPER; A. Absent a State Interest of the 'Highest Order,' Florida Statutes, *Section 794.03 is Unconstitutional When Applied to Punish the Truthful Publication of Lawfully Obtained Facts of Public Concern;* 1. The alleged commission of a sexual offense is within the scope of legitimate public concern; 2. The newspaper lawfully obtained the information from the police; 3. The protection of rape victims from embarrassment is not a state interest of the 'highest order;' B. *Section 794.03 is Unconstitutional on its Face Because it Does Not Provide a Method of Balancing the Asserted State Interests in Confidentiality Against First Amendment Rights."* (Amicus Initial Brief to the district court at -i-) (Emphasis added)

11. "*The narrower ground is that the statute is unconstitutional as applied in this case.* In other words, can *Fla. Stat.* §794.03 validly confer a private cause of action for damages arising out of the Star's publication of a bona fide news story based upon information found in police reports made freely available to the public and press by the Sheriff's Office?

(Continued on following page)

and Amicus[12] both reasserted the unconstitutionality of §794.03 in their reply briefs to the district court. Additionally, although Appellant's present counsel did not represent Appellant in the district court, they have been informed that Appellant's prior counsel and amicus both specifically argued the unconstitutionality of §794.03 during oral arguments before the district court.[13] Appellant and Amici also presented the unconstitutionality of the statute to the Florida Supreme Court as set forth on page 4 at n.3 and 4.

The statute was drawn into question, and a decision made in favor of §794.03's validity. *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 605 (1975); *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965); *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 60 n.3 (1963); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 287-290 (1921). The question of whether the Federal question in this case was sufficiently and properly raised in the Florida courts is ultimately a federal question. *Street v. New York,* 394 U.S. 576, 583 (1969).

Footnote continued—

The answer clearly is 'no.' . . . *The broader basis upon which to reverse is that Fla. Stat. §794.03 is unconstitutional on its face.* Obviously, if it is facially invalid, then . . . has no cause of action based upon an asserted violation of an invalid statute." (Appellant's Reply Brief to the district court at 16-17) (Emphasis added)

12. "*The Challenged Statute is Unconstitutional on its Face* Because it Does Not Provide a Method of Balancing the Asserted State Interests and Confidentiality Against First Amendment Rights." (Amicus Florida First Amendment Foundation Reply Brief to the district court at 25) (Emphasis added)

13. Upon belief and knowledge, there is no transcript of the oral argument.

The district court rejected the Appellee's argument that the specific challenge was not preserved for appellate review[14] and that "the jurisdiction of the district court must await determination of the newspaper's Rule 1.480 motion."[15] The rule does not require the *filing* of a post-trial motion for directed verdict. In any event, the abandonment of post-trial motions do not constitute a waiver of a party's right to raise an issue on appeal. Abandonment of post-trial motions is not synonymous with abandonment of the underlying issues. *See Bianco v. Bianco,* 383 So.2d 1120, 1122 (Fla. Dist. Ct. App. 1980). Abandonment merely vests the appellate court with jurisdiction. *State v. District Court of Appeal, 3d District,* 187 So.2d 890, 891 (Fla. 1966).

CONCLUSION

Appellant respectfully requests the Court to deny Appellee's motion to dismiss the appeal for lack of jurisdiction. In the alternative, if the Court grants Appellee's motion to dismiss, Appellant respectfully requests that the Court treat the improvident appeal as a petition for writ of certiorari under 28 U.S.C. §1257(3) and 2101. *Richmond Newspapers Inc. v. Virginia,* 448 U.S. 555, 562-

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14. "The newspaper's First Amendment challenge to the plaintiff's judgment was not preserved for review, because the newspaper abandoned its post-trial motion for judgment by simultaneously filing its notice of appeal, thereby preventing the trial court from ruling upon it." (Appellee's brief to the Florida First District Court of Appeal at 10)

15. Appellee's Answer brief to the Florida First District Court of Appeal at 16 n.5.

563 n.4 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84, 94 n.4 (1978).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Joel D. Eaton, Esquire, 800 City National Bank Building, 25 West Flagler Street, Miami, FL 33130; and The Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, FL 32301 this 9th day of November, 1987.

GEORGE K. RAHDERT, ESQUIRE
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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 87-329

In The

Supreme Court of the United States

October Term, 1987

THE FLORIDA STAR,
Appellant,

v.

B.J.F.,
Appellee.

On Appeal from the First District Court of Appeal
State of Florida

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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No. 87-329

In The
Supreme Court of the United States
October Term, 1987

The Florida Star
Appellant,

v.

B.J.F.
Appellee.

On Appeal from the First District
Court of Appeal, State of Florida

Brief Amicus Curiae of
The Reporters Committee
For Freedom of the Press
In Support of Appellant's
Jurisdictional Statement

INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated as-

sociation of working reporters and editors dedicated to defending the First Amendment and the freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Reporters Committee believes that the decision below has far-reaching implications for journalists around the country, not only in Florida. Permitting states to punish publication of information from government documents when legally obtained by the news media will, as this Court recognized in Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), lead to "timidity and self-censorship and . . . suppression of many items . . . that should be made available to the public." 420 U.S. at 496

Amicus has written permission from both parties to file this brief. Copies of their

letters have been filed with the clerk in accordance with U.S. Supreme Court Rule 29.

The Reporters Committee has appeared before this court as amicus curiae in numerous cases involving reporters' rights, including cases challenging restraints on publication of legally obtained information, such as Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

STATEMENT OF THE CASE

Amicus adopts the statement of the case provided by the Appellant in its jurisdictional statement.

SUMMARY OF THE ARGUMENT

This Court has repeatedly stated that the news media cannot be punished criminally or civilly for truthfully reporting information obtained from publicly available government documents. Yet the court below, by permitting award of damages in a civil action claiming invasion of privacy, impliedly affirmed the constitutionality of a statute imposing criminal sanctions for publishing the identity of a rape victim regardless of the source of the information. Holding a newspaper liable in such situations violates the First Amendment because it punishes truthful publication of publicly available information, encouraging self-censorship and timid-

ity on the part of the news media, as this Court has ruled.

This Court has repeatedly made clear that a reporter who committed no crime in obtaining information from public proceedings or documents has obtained the information legally, and that publication is privileged.

In this case, the identity of a rape victim was obtained from a police incident report placed in the Sheriff's Department press room for reporters to read. No attempt was made by the sheriff to conceal the victim's identity, despite the fact that such information is exempt from disclosure under the state public records law. Nonetheless, the District Court of Appeal concluded that the victim's name "was of a private nature and not to be published as a matter of law." The Florida Star v. B.J.F., 499 So.2d 883, 884 (Fla. Dist. Ct. App. 1987)

Even tnough the reporter obtained the information legally, the newspaper was held liable for substantial damages.[1]

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[1] Amicus supports Appellant's contention that the First Amendment prohibits imposition of strict liability for invasion of privacy in this case but, in the interest of brevity, has chosen not to address that issue here. However, should review be granted, amicus does not waive its right to address Appellant's second question in a brief on the merits.

I. Florida Statute §794.03, Invoked In This Case To Impose Civil Liability On A Newspaper, Violates The First Amendment No Less Than The Statutes Declared Unconstitutional By This Court In Cox Broadcasting v. Cohn And Its Progeny.

A small newspaper, The Florida Star, has been held liable for civil damages totaling $97,500 for publishing a rape victim's name obtained from a public record -- a Sheriff's Department incident report. Although the victim's identity was placed in the public domain by the sheriff, who routinely put unredacted copies of such reports in the department press room, the Florida District Court of Appeal ruled that her identity "was of a private nature and not to be published as a matter of law." The Florida Star v. B.J.F., 499 So.2d 883, 884 (Fla. Dist. Ct. App. 1987).

The basis for finding that the plaintiff's identity was private was Florida Stat. §794.03, which makes it a misdemeanor to

"print, publish, or broadcast . . . the name, address, or other identifying fact or information of the victim of any sexual offense. . . ." The statute is virtually identical in operation to Ga. Code Ann. 26-9901, which this Court found to be facially unconstitutional in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Despite the fact that the constitutionality of §794.03 was squarely before it, the Court of Appeal disposed of the merits of the case in one paragraph without mentioning the First Amendment. It relied heavily on a state attorney general's opinion, written four months after Cox was decided, stating that:

> In the event such nonpublic information is obtained and printed, published, or broadcast prior to open, public judicial proceedings, the holding of Cox does not purport to prohibit the state from prosecuting those individuals who have violated s. 794.03.

1975 Op. Att'y Gen. 075-203 (1975), hereinafter referred to as O.A.G. 075-203.

Of course, in 1975 the attorney general could not have anticipated that in the ensuing five years this Court would issue two opinions striking down statutes permitting prosecution of journalists for publishing information obtained legally from non-judicial government records designated confidential under state law. But there was no justification for the Florida District Court of Appeal to simply disrega.. those decisions and others which make clear that a statute penalizing publication of information in the public domain "requires the highest form of state interest to sustain its validity." Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979).

In Cox, this court recognized the grave risk to free expression posed by a state

statute almost identical to §794.03. According to the opinion by Justice White, forbidding the news media to publish accurate accounts of publicly available information:

> [W]ould make it very difficult for the media to inform citizens about public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.

Cox, 420 U.S. at 496.

In Cox, as in this case, the plaintiff sought damages for invasion of his privacy resulting from an accurate news story identifying a rape victim, his deceased daughter. Noting that the reporter had obtained the information from public court documents, the majority ruled that "the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability." Id. at 497.

Three years later, in Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978), the Court ruled that the First Amendment prohibited the state from punishing a newspaper for publishing information about a Judicial Inquiry and Review Commission investigation and identifying the judge under scrutiny. A provision of the state constitution required that such investigations be confidential and the statute, under which the Virginian Pilot was prosecuted, made it a misdemeanor for "any person (to divulge such information) to anyone except the Commission." Va. Code §2.1-37.13.

Finding that Virginia had a substantial interest in protecting the confidentiality of such investigations, former Chief Justice Warren Burger nonetheless wrote that:

> [T]he publication . . . lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and po-

> tential encroachments on freedom of speech and of the press which follow therefrom.

Id. at 838.

In 1979, in Smith, supra, this Court ruled that the First Amendment barred conviction of a newspaper for publishing the identity of a juvenile homicide suspect in violation of a state statute. The newspaper had obtained the youth's identity from police and a prosecutor, despite a state law requiring the officials to keep the name confidential.[2]

Referring to the line of cases beginning with Cox, Chief Justice Burger stated that:

> [A]ll suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not con-

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2 "All records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released." W.Va. Code §49-7-1 (1986).

> stitutionally punish publication of the information, absent a need to further a state interest of the highest order.

Smith, supra at 103.

In Cox, the Court implicitly found that protecting the identities of rape victims in such situations did not meet this test. In Landmark and Smith, the Court ruled explicitly that protecting judges from embarrassment, the judicial system from public distrust, and the state's interest in rehabilitating juvenile delinquents were insufficient justifications for statutes such as Florida statute §794.03. In fact, the opinion in Smith stated that these decisions "demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." Smith, 443 U.S. at 102.

In the courts below, Appellee argued that the claim against The Florida Star was

not governed by Cox because this Court's decision was limited to situations in which reporters published information from open court records. Because public officials, such as judges, have a diminished right of privacy, and because there is strong public interest in knowing about the operation of the courts, Landmark is inapposite, Appellee contended. Smith did not apply because reporters obtained the juvenile's name through interviews, albeit with police and a prosecutor, rather than from documents the reporters knew were confidential, Appellee said.[3]

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[3] The attorney general's opinion on which the District Court of Appeal relied heavily in this case states that a Public Records Act provision exempting records identifying rape victims from disclosure prohibits officials from disclosing such information orally. O.A.G. 075-203.

No matter how she attempts to distinguish those cases from this one on their facts, by upholding the civil judgment in this case, $72,500 compensatory damages and $25,000 punitive damages, the Florida Court of Appeal decision threatens the First Amendment values this Court sought to protect in those cases. This Court focused in Cox and its progeny on the media self-censorship that would result from creating doubt in journalists' minds about whether they could publish publicly available government information without being held civilly or criminally liable. As will be discussed in Section II below, the Court of Appeal decision in this case places reporters in the quandary of having to determine whether information handed to them by public officials is in "the public domain" and, hence, may be published without risk of liability.

Furthermore, in affirming the judgment against The Florida Star, the appeals court failed to comply with analytical requirements set down by this Court in Landmark:

> [T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

435 U.S. at 844. Instead, it relied on an opinion of the attorney general and a sister court's dicta in Doe v. Sarasota-Bradenton Florida Television Co. Inc., 436 So.2d 328 (Fla. Dist. Ct. App. 1983). That case followed the reasoning in Cox, holding that a broadcaster could not be held civilly liable under §794.03 for airing pictures of a rape victim testifying at the trial of her alleged assailant. As an aside, the Doe court stated, "we do not conclude that the statute can never be invoked by persons seeking to shield themselves from public scrutiny" and cited the attorney general's opinion. 436 So.2d at 330.

Amicus does not intend to minimize the tragedy in October 1983 involving B.J.F. But Appellee argues that the identity of a rape victim is of no substantial concern to the public and, therefore, the state may punish its publication to protect victims' privacy. In Cox, this court clearly rejected that argument.[4]

This court's decisions make clear that Florida's interest in protecting rape victims

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4 "The commission of crime . . . [is] without question [an] event[] of legitimate concern to the public and consequently fall[s] within the responsibility of the press to report the operations of government." 420 U.S. at 492.

such as B.J.F., must yield to the First Amendment interest in the dissemination of news, as did the interests of Georgia in Cox, of Virginia in Landmark, and of West Virginia in Smith. As Justice Stewart concluded, concurring in the judgment in Landmark, "If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish." 435 U.S. at 849

II. The Decision Below Poses A Risk Of News Media Self-Censorship More Detrimental To First Amendment Interests Than That Found Intolerable In Cox And Its Progeny.

The District Court of Appeal stated flatly that B.J.F.'s identification as a rape victim "was of a private nature and not to be published as a matter of law."[5] It relied entirely on the wording of §794.03 and the 1975 attorney general opinion recharacterizing the statute so that it would not conflict with this Court's holding in Cox.

The attorney general stated that:

> Prior to open public judicial proceedings, the name or other identifying in-

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[5] 499 So.2d at 884. It is worthy of note that this case was filed, went to trial before a jury and was briefed and argued to the District Court of Appeal under B.J.F.'s full name. Regardless of the lengthy, public court record, the Court of Appeal in a footnote to its decision stated that "The style of the case has been revised by the court sua sponte in order to preserve appellee's privacy interest." 499 So.2d at 883.

> formation concerning victims of sexual assaults is not part of an open public record and may not be publicly disclosed in any manner by the custodian of such records.

O.A.G. 075-203. The attorney general apparently concluded that such information would not be public under any circumstances prior to judicial proceedings by reading §794.03 in conjunction with Florida Statute §119.07(2)(b) which stated that "All public records referred to in §794.03 . . . are hereby exempt from the provisions of this section."[6] Such information is "confidential by law," according to the attorney

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[6] At the time The Florida Star published the story on which this case was based, the exemption could be found at §119.07(3)(h) and stated:

> Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of any sexual battery as defined in Section 794 . . . is exempt from the provisions of subsection (1) [requiring custodians of public records

general's opinion.

Although he stated that journalists could be prosecuted, even when the victim's identity was obtained from publicly available documents, the attorney general quoted Justice White's admonition to state officials in Cox that:

> If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. (footnote omitted)

420 U.S. at 496. In addition to the passage quoted above, stating that such information "may not be publicly disclosed" by record custodians, the attorney general's opinion

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[6] Continued
to make them available for public inspection].

states four times that officials must keep the identities of sexual assault victims secret.[7]

Despite these warnings, the Jacksonville Sheriff's Department routinely made unredacted incident reports concerning sexual assaults available to reporters in the department press room. It was there that The Florida Star reporter obtained B.J.F.'s iden-

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[7] "A police chief . . . is obligated and charged with the duty by operation of law not to allow or permit public inspection. . . ;" an "implied duty [is] on the custodian of such records not to disclose that information which in legal effect is confidential. . . ;" "no law exists which expressly or impliedly authorizes the custodian to disclose such information by any means;" "The fact that the information might be disclosed orally as opposed to allowing inspection . . . of the records . . . is of no import insofar as the prohibitions contained within ss. 119.07(2)(b) and 794.03."

tity legally by reading a publicly available police record.

Cox held that "at the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." Id. (emphasis added). Yet the 1975 attorney general's opinion, cited as justification for the holding below, interpreted Cox as providing protection for publication of information from court records only.

Appellee has characterized The Florida Star's acquisition of her name as theft. She argued in the Court of Appeal that because the sheriff violated §119.07(3)(h) by disseminating her name to the newspaper, the reporter obtained the information illegally, and that Cox and subsequent cases protecting

publication of legally obtained information were therefore inapplicable.

However, Landmark and Smith clearly negate this argument.

In Landmark, this Court ruled that Virginia violated the First Amendment by prosecuting a newspaper for publishing the identity of a judge under investigation by a judicial inquiry commission in violation of a law stating that:

> All papers filed with and proceedings before the Commission, . . . including the identification of the subject judge as well as all testimony and other evidence . . . , shall be confidential and shall not be divulged by any person to anyone except the commission . . . Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.

435 U.S. at 830-31 n.1 (citing Va. Code §2.1-37.13 (1973)). The Virginian Pilot had obtained material about the investigation by interviewing several people, including local lawyers, who, under the absolute terms of the

statute, probably violated the law by provided information to the newspaper. Nonetheless, this Court stated that "We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."[8] Id. at 837

Smith presented to this Court a statutory scheme very similar to the one at issue in this case. West Virginia had a statute designating certain sensitive information confidential and a companion statute prohibiting publication of that information.

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[8] The question before the court, as framed by Chief Justice Burger in the opinion was "whether the First Amendment permits the criminal punishment of third parties who are strangers to the inquiry, including news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission." (footnote omitted) 435 U.S. at 837.

In that case, police and a prosecutor at the scene of a homicide provided reporters with the identity of the juvenile suspect despite W.Va. Code §49-7-1, which makes it a misdemeanor for law enforcement and other officials to divulge such information. The newspapers then violated another statute by printing the youth's identity "without a written order of the court." W.Va. Code §49-7-3 (1986).

Despite these two statutes, this Court concluded that the West Virginia reporters:

> relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information. (citations omitted) If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.

443 U.S. at 103-04.

Finally, in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), this Court ruled that the First Amendment does not permit a state court to prohibit the publication of a juvenile's name and photo obtained in a proceeding that was in fact public.

In that case, a judge permitted reporters to attend a detention hearing for an 11-year-old murder suspect despite a statute making such hearings secret. The judge then issued an order prohibiting publication of the youth's name and a picture, taken as the suspect left the hearing. The Oklahoma Supreme Court upheld the prior restraint, finding that a state law permitted public access to the hearing only by court order and that the judge never issued such an order.

This Court's per curiam opinion stated:

> Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge. . . . There is no evidence that

> petitioner acquired the information unlawfully or even without the State's implicit approval.

430 U.S. at 311.

In short, the decisions in Cox, Landmark, Smith, and Oklahoma Publishing acknowledge that states have authority to keep information secret to protect the privacy rights of individuals, including rape victims, juveniles and, perhaps, even judges. Taken together, however, these decisions also make clear that where the state provides or makes possible media access to government information, as it did in the Florida Star case, there is a heavy presumption against the constitutional validity of statutes prohibiting or punishing publication of that information.[9]

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[9] Concurring in the judgment in Landmark, Justice Stewart wrote that: "Though government may deny access to information and punish its theft,

As this Court recognized in Cox, holding the news media civilly liable for publishing information from government documents made available to them, which was later deemed offensive to the reasonable person, would invite "timidity and self-censorship" and suppression of many important news stories. 420 U.S. at 496.

Under the Cox line of cases, a media organization can readily determine whether publication of accurate information poses a risk of criminal or civil liability. If the journalist did not commit a crime in acquiring

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[9] Continued
government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming. 435 U.S. at 849 (citations and footnote omitted)(emphasis added).

the information then publication is privileged.

If the decision of the Florida Court of Appeal is allowed to stand in this case, the danger to the First Amendment will be far more serious than that present in Cox. A journalist allowed to examine government documents will first have to determine whether the official who provided the material had authority to do so, and if not, whether the journalist will be deemed to have stolen the information, as Appellee suggests he or she should be. Under this theory, applicability of the privilege depends not on whether the journalist committed a crime, but on whether the public official breached "an implied duty . . . not to disclose that information." O.A.G. 075-203.

CONCLUSION

The District Court of Appeal decision in this case conflicts with this Court's decisions holding that the news media may not be punished criminally or civilly for publishing information from government documents in the public domain. Furthermore, the court below offered no justification for ruling that Florida's interest in punishing publications such as the one at issue here was of greater significance than those present in Cox, Landmark, Smith and Oklahoma Publishing.

Therefore, amicus urges this Court to note probable jurisdiction in this case and

declare §794.03 unconstitutional.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 87-329

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE FLORIDA STAR,

Appellant,

VS.

B.J.F,

Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

BRIEF OF AMICUS CURIAE TIMES HERALD PRINTING COMPANY IN SUPPORT OF JURISDICTIONAL STATEMENT

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The jurisdictional grounds, the opinions below, a statement of the case, the constitutional and statutory provisions involved and how the federal question was raised are set forth in Appellant's Jurisdictional Statement and are adopted herein.

STATEMENT OF AMICUS CURIAE

Amicus Curiae, The Times Herald Printing Company, has no financial interest in this case. However, as a publisher of a daily newspaper,[1] Amicus Curiae is continuously involved in reporting matters of public interest and reporting matters based upon facts obtained from public documents. Amicus Curiae is gravely concerned about the effect the holding of the First District Court of Appeal for the State of Florida will have upon the ability of the press to report issues of public concern and report information obtained from public documents. In particular, Amicus Curiae has a vital interest in insuring that, under the First and Fourteenth Amendments to the United States Constitution, states may not impose criminal penalties for the publication of truthful information obtained from government records. Amicus Curiae further has an interest in insuring that states may not impose strict liability in an action for invasion of privacy against a media defendant for the publication of truthful information on matters of public concern or truthful information obtained from public records.

The effect of the Florida court's decision is by no means limited to the State of Florida. Amicus Curiae, like many newsgathering organizations of its size, reports events on a nationwide basis. The decision of the Florida court will necessarily have a chilling effect on the reporting of matters of public concern nationwide. Accordingly, Amicus Curiae respectfully files this Brief in Support of Appellant's Jurisdictional Statement, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, and would urge this Court to consider and resolve the serious and substantial federal questions presented by Appellant's Jurisdictional Statement.

[1] Amicus Curiae publishes The Dallas Times Herald, a daily newspaper in Dallas, Texas.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Florida court's decision allows criminal penalties for the publication of truthful information legally obtained from public documents in which the public has a vital interest. Furthermore, the Florida decision allows a civil action for invasion of privacy in which a plaintiff may recover damages from a media defendant on the basis of strict liability for the truthful publication of facts obtained from public records and readily acknowledged to be matters of public concern. The Florida court did not require the plaintiff to show any fault on the part of the media defendant, nor did it require the plaintiff to show that the complained of publication included false statements of fact. Additionally, the Florida court did not require any showing that the asserted state and individual interests in privacy were compelling and could not be accommodated in a manner less restrictive of fundamental First Amendment rights. Consequently, the decision of the Florida court, upholding the criminal statute at issue and rejecting the First Amendment assertions of Appellant, has abrogated an important area of First Amendment protection regarding the accurate reporting of the contents of public documents. The decision is clearly contrary to precedent set by this Honorable Court as well as to decisions of other Federal and State courts.

Appellant has been accurate and thorough in its presentation of the conflict of the Florida decision with authority from this Court as well as other Federal and State courts.[2] Rather than reiterate Appellant's presentation of authority, Amicus Curiae will further highlight how the Florida decision directly conflicts with authority of this Court in three different respects.

[2] As well as the authority cited by Appellant, Amicus Curiae would direct the Court's attention to footnote 25 in *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029, 1046 (1975), wherein this Court itself undertook a review of federal and state court decisions "emphasizing as a defense to actions claiming invasion of privacy the fact that the information in question was derived from official records available to the public."

A.

THE FLORIDA DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT ON THE SPECIFIC ISSUE PRESENTED BY THIS APPEAL

The dispute before this Court requires the Court to once again balance asserted state and individual concerns for privacy with First Amendment freedoms. The specific question which brings these two competing concerns at odds herein is extremely narrow, namely, may a state statutorily impose criminal and civil liability upon a publisher for the publication of truthful information legally obtained from official documents regarding the commission of a crime.

The facts of this case are virtually identical to the facts of *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029 (1975), in which this Court held that in such a situation, First Amendment protections are paramount. In *Cox Broadcasting Corp.*, this Court declared unconstitutional a state statute subjecting a media defendant to criminal and civil liability for the publication of the identity of a rape victim. The issue in *Cox Broadcasting Corp.*, as stated by this Court, was "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." 95 S.Ct. at 1044.

As in *Cox Broadcasting Corp.*, this Court need not, in this appeal, address the broader issue of "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press. . . ." 95 S.Ct. at 1044. Instead, the issue in this case is again focused on criminal and civil penalties for invasion of

privacy for accurately reporting information contained in official records available to the *public*, and on events in which the *public* has a strong interest.

The reporting of crime is clearly a matter of public interest. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. at 1045. *See also Thornhill v. Alabama*, 60 S.Ct. 736, 743-44 (1940). Crime, by definition, involves intrusion upon private areas, be it the home, the person or some other aspect of private life. Consequently, conflict between privacy interests and the reporting of crime, one of the traditional responsibilities of the press, is inevitable. When this conflict arises, the reporting of crime and "the beneficial effects that public scrutiny [has] upon the administration of justice" have consistently been held by this Court to outweigh an asserted state or individual interest in privacy. *Cox Broadcasting Corp. v. Cohn; Smith v. Daily Mail Publishing Company*, 99 S.Ct. 2667 (1979); *Landmark Communications, Inc. v. Virginia*, 98 S.Ct. 1535 (1978); *Oklahoma Publishing Co. v. District Court*, 97 S.Ct. 1045 (1977). Pursuant to this line of authority, a media defendant cannot be held liable for the truthful publication of information regarding criminal conduct and the prosecution of crime.

Moreover, the published information at issue herein was obtained lawfully from official records open to the public. "Public records by their very nature are of interest to those concerned with the administration of government, and a public

benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. at 1046.[3]

It is undisputed that Appellant accurately reported matters contained in the police incident report. As was the case in *Oklahoma Publishing Co. v. District Court*, 97 S.Ct. at 1047, there can be no contention in this case that Appellant "acquired the information unlawfully or even without the State's implicit approval." "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . ." *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. at 1045. "When the information involved already appears on the public record" the privacy interests of an individual fade. *Id.* at 1046.

[3] The in-house policy of The Florida Star against publishing the names of rape victims is not significant in balancing the rights of the press with the asserted privacy interests of an individual. The fact that one publisher has determined that under its social, moral or professional code, it would not publish a rape victim's name does not indicate that the name of the victim appearing on a public document is not a matter of public interest or a subject which should not enjoy First Amendment freedom. In *Smith v. Daily Mail Publishing Co.*, this court did not find significant the fact that the Daily Mail initially declined to publish the name of a juvenile defendant. In *Nebraska Press Ass'n v. Stuart*, 96 S.Ct. 2791 (1976), the Nebraska Bar-Press Guidelines, and what a reasonable publisher might do under such Guidelines, were not significant. In short, a newspaper's in-house policy, or the professional policies of other news organizations, does not supplant First Amendment guarantees. "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man." *Cox Broadcasting Corp.*, 95 S.Ct. at 1046. The First Amendment exists for the protection of the public, and the in-house policy of a newspaper does not alter the public's right to be informed as to matters related to crime in the community.

The Florida statute at issue proscribing publication of the name of a rape victim cannot be relied upon to show that the nature of the information published was not public or that the document from which the information was obtained was not a public document. This Court in *Cox Broadcasting Corp. v. Cohn* rejected a similar argument regarding the Georgia statute at issue in that case. 95 S.Ct. at 1036. The document from which the information was obtained by the reporter trainee for The Florida Star was a document maintained by police in the conduct of official business and involved reporting of crime, a public issue by definition. It was maintained in a public place — the police department's press room to which access was unrestricted — by a public official and was open to any member of the public who chose to view it. To allow criminal or civil liability to arise from the accurate reporting of the contents of an official report regarding the commission of a crime would make it very difficult for the media to fulfill its responsibility to "inform citizens about the public business and yet stay within the law." *Cox Broadcasting Corp.*, 95 S.Ct. at 1046. The press should not be obligated to inquire as to the authority of the public official or public source from which it obtains an official document. The imposition of such a requirement would necessarily have a chilling effect on newsgathering from public sources, a chilling effect which the above-cited decisions of this Court have emphatically sought to avoid.

Appellant, in its Jurisdictional Statement, has accurately and thoroughly cited authority from this Court which has consistently upheld the role of the press in reporting crime and criminal punishment as paramount over state and individual privacy concerns. Most of those cases involved situations where a media representative was granted what might be termed "accidental access" to public documents or information of a public nature. It is therefore not significant that the reporter trainee for The Florida Star in this case was able to lawfully and properly obtain information which he might not have been able to obtain had state officials been following designated procedures.

In *Cox Broadcasting Corp. v. Cohn*, the reporter ascertained the identity of a rape victim from an examination of indictments given to him by a clerk of the court during a recess of court proceedings against the rape defendants. Similarly, in *Oklahoma Publishing Co. v. District Court*, 97 S.Ct. 1045 (1977), there was a contention that the juvenile hearings from which a reporter published information should have been closed to the public under Oklahoma law. In overturning the district court order which had enjoined newspapers from publishing the name or picture of a child involved in the juvenile proceedings to which a reporter had been granted access, this Court held that the name of the juvenile involved became public "much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain." 97 S.Ct. at 1047. There can be no question in the case at bar that Appellee's name was placed in the public domain.[4]

The principle that once the media has been granted access to public documents, information or proceedings, the publication of that information should not be enjoined was embraced in *Smith v. Daily Mail Publishing Co.*, 99 S.Ct. 2667, 2671 (1979). "[O]nce the truthful information was 'publicly revealed' or 'in the public domain' " its dissemination cannot be constitutionally restrained. *Accord, Nebraska Press Ass'n v. Stuart*, 96 S.Ct. 2791 (1976), *Oklahoma Publishing Co. v. District Court*. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others

[4] Although the case at bar does not directly involve what right of access the press has to such information, Amicus Curiae would note that in order to deny access to criminal proceedings involving even a juvenile rape victim, a state must make a convincing showing that a compelling state interest will be served. *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613, 2620-22 (1982).

reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox Broadcasting Corp.*, 95 S.Ct. at 1047. If court proceedings are open to the public, "[t]hose who see and hear what transpired can report it with impunity." *Craig v. Harney*, 67 S.Ct. 1249, 1254 (1947).

It is not mandatory that the government itself provide or make possible press access to the information in order for the media to enjoy constitutional protection from criminal punishment for the publication of truthful information about a matter of public significance. Indeed in *Smith v. Daily Mail Publishing Co.*, the Daily Mail obtained information regarding the identity of a juvenile criminal defendant by monitoring police band radio frequencies and interviewing eyewitnesses. 99 S.Ct. at 2671.[5] A free press is entitled to rely upon "routine newspaper reporting techniques" to ascertain its information. 99 S.Ct. at 2671. The techniques of the reporter trainee for The Florida Star in this case cannot be classified as anything other than routine newspaper reporting techniques.

Regardless of how a reporter obtains information regarding matters of public concern, the restraint of publication of such information, as well as the criminal punishment for truthful publication of such information, lies at the core of the First Amendment and such publication is therefore not generally subject to regulation. In overturning a Georgia statute similar to the Florida statute at issue in the case at bar, this Court stated:

> [t]he Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression — the content of a

[5] In *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), the Seventh Circuit declared unconstitutional a statute providing for criminal punishment against any person who truthfully publishes the name of an individual against whom a sealed criminal indictment or information has been filed even though the reporter who published the name of the subject of the criminal indictment in that case obtained his information not from the criminal indictment itself but rather from a confidential source.

> publication — and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition.

95 S.Ct. at 1046.

Indisputably, the reporter for The Florida Star lawfully and properly obtained access to the public document on which he based the paragraph in the Police Reports section of the weekly newspaper. In such an instance, it is well settled that the press is not liable for truthfully publishing such lawfully obtained public information even though the information obtained from the public document is assertedly private. As this Court stated in *Landmark Communications, Inc. v. Virginia*, 98 S.Ct. 1535, 1545 (1978), the threat to privacy in this case, or to the orderly administration of justice at issue in *Landmark Communications*, "can be eliminated through careful internal procedures to protect the confidentiality of [judicial] proceedings." Since the asserted privacy interests underlying the Florida statute may be served by a means less restrictive of First Amendment expression, the Statute is unconstitutional under a separate line of decisions from this Court.

B.

THE FLORIDA DECISION CONFLICTS WITH DECISIONS OF THIS COURT WHICH REQUIRE APPELLEE TO SHOW A COMPELLING STATE NEED FOR THE FLORIDA STATUTE AND THAT THE ASSERTED STATE INTERESTS CANNOT BE SERVED BY LESS RESTRICTIVE MEANS

The Florida statute applies solely to the publication of information by instruments of mass communication. When a state singles out the press or instruments of mass communication for special statutory treatment, such a statute or regulation is subject to the strictest scrutiny and should only be upheld when the state interest is compelling and there is no way to further the state interest that would be less restrictive of the press. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S.Ct. 1365 (1983).

The Florida statute may also be viewed as a prior restraint on the press. "Prior restraints have been accorded the most exacting scrutiny in previous cases." *Smith v. Daily Mail Publishing Co.*, 99 S.Ct. at 2670. Whether the statute is or is not a prior restraint, however, is not a prerequisite to imposing the "most exacting scrutiny."

> Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. . . .Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.

Smith v. Daily Mail Publishing Co., 99 S.Ct. at 2670.

Accordingly, whether the statute at issue is viewed as a prior restraint *(Nebraska Press Ass'n v. Stuart)*, a penal sanction for publishing lawfully obtained, truthful information

(Smith v. Daily Mail Publishing Co.), or as a statute which singles out the press for special regulatory treatment *(Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue)*, it can only withstand constitutional scrutiny if it furthers a compelling state interest and that interest cannot be secured by a means less stifling of fundamental liberties.

That the asserted state interest in privacy cannot override First Amendment protections has already been discussed under Section A above. For the reasons stated therein, Appellee cannot show that the statute at issue furthers a compelling state interest and therefore the statute is invalid. Nevertheless, Amicus Curiae respectfully submits that Appellee likewise is unable to meet the second part of the constitutional standard set forth above.

There was no showing in the court below that the state interest could be furthered by means less restrictive of First Amendment expression. Indeed there are alternative means available. For instance, the state could achieve the same goal by providing for penalties against public officials who reveal the identities of rape victims. As this Court noted in *Landmark Communications, Inc.*, the confidentiality of the incident report could be insured by more "careful internal procedures." 98 S.Ct. at 1545. In fact, the Florida statute allows for an action against public officials who release information and Appellee recovered, in settlement, a sum of money from the public officials who were responsible for releasing the incident report revealing Appellee's identity. There has been no showing that such a penalty is ineffective in achieving the asserted state interest in privacy. Indeed when the system fails, and the identity of the victim is released, Florida courts are obviously willing to grant a plaintiff money damages against the state. There is therefore no reason to subject the press to liability as well.

This Court also addressed this point in *Cox Broadcasting Corp.* "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." 95 S.Ct. at 1047. Consequently, even if there were a compelling state interest in privacy, the fact that such an interest could be accommodated by other means clearly renders the statute at issue unconstitutional.[6] The failure of the Florida court to consider this point directly conflicts with the above-cited decisions of this Court.

The Florida statute is also unconstitutional as a result of its breadth. Even if the statute did further a compelling state interest, in order to withstand constitutional scrutiny the statute must be carefully tailored to secure the asserted state interest in the least restrictive manner. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue,* 103 S.Ct. 1365, 1372 n.7 (1983). The Florida statute cannot meet that standard. For instance, the statute does not allow for publication of a rape victim's name when that information may, as in the case at bar, already be public. In fact, the statute presumably prohibits any newspaper from revealing Appellee's name in reporting on her suit against The Florida Star despite the fact that Appellee herself brought her identity out in public by filing this action.[7]

Furthermore, the statute apparently does not even allow for publication of the rape victim's name when the victim may consent to having her name published. There may be instances when a rape victim wants publicity in order to promote rights for rape victims or to expose a situation which, if publicized and alleviated, might reduce the incidence of rape. However, the statute would not allow such publication. The statute is therefore unconstitutional on its face because it is not carefully tailored to promote the asserted state interest in the least restrictive manner.

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[6] *See also Landmark Communications, Inc.*, 98 S.Ct. at 1542 n.12, *Smith v. Daily Mail Publishing Co.*, 99 S.Ct. at 2672.

[7] See Appellee's Amended Complaint, Jurisdictional Statement at A7.

The statute at issue clearly is directed only towards instruments of mass communication. In effect, the statute affords the press more limited rights to public information than the public at large which instruments of mass communication have a responsibility to serve. It is troubling from a constitutional perspective that a member of the general public could have entered the public access room of the police department, obtained the same information from the same police incident report, circulated the contents of the police report, including the rape victim's name to every member of the community which The Florida Star serves, and not been subject to any liability. In a similar vein, every member of that community served by The Florida Star could have walked into the public access room at the police department and obtained the same information. Yet The Florida Star, which is vested with the responsibility to inform the public so that all of the members of the community do not in fact converge on the police station to view the contents of police incident reports, could not report the contents of the document.

Because the Florida statute singles out instruments of mass communication and affords them less First Amendment protection than the public at large, the statute cannot withstand constitutional scrutiny unless the state interests are substantial and cannot be achieved by a means less stifling of fundamental freedoms. The Florida court did not require such a showing to be made in the face of Appellant's constitutional challenge. The previous decisions of this Court indicate that asserted state and individual interests in privacy are not so substantial that they may override the rights of the press guaranteed by the First Amendment and indeed the *responsibility* of the press to report on matters of public interest. Furthermore, there are means available to further such a state interest which do not intrude upon First Amendment expression. The Florida statute wholly fails to meet the required constitutional standards.

C.

THE EXISTENCE OF THE FLORIDA STATUTE ILLUSTRATES THE NEED FOR AN EXPLICIT PRONOUNCEMENT BY THIS COURT PROHIBITING IMPOSITION OF LIABILITY FOR TRUTHFUL PUBLICATION OF MATTERS OF PUBLIC INTEREST

This case presents an opportunity for the court to broaden the holding of *Cox Broadcasting Corp. v. Cohn* and make clear that a plaintiff suing a media defendant for invasion of privacy must prove both fault and falsity when the complained of publication involves a matter of public concern. Such a holding is implicit in decisions of this Court, yet the fact that litigation continues to arise in this area perhaps invites a more direct pronouncement.

Without deciding the question reserved by this Court in *Cox Broadcasting Corp.* of whether a state may ever prescribe civil or criminal penalties for truthful publications, clearly in matters of public interest truth should, at the very least, be a complete defense. Decisions of this Court in fact require a plaintiff to prove falsity as an element of a common law action for damages against a media defendant for the publication of a matter of public interest. In *Time Inc. v. Hill*, 87 S.Ct. 534, 541-542 (1967), this Court held that where the interest involved is a right of privacy, a plaintiff in a cause of action for publication of false or misleading information about one's affairs "must prove knowing or reckless falsehood where the materials published, although assertedly private, are 'matters of public interest'." *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. at 1044 *quoting Time Inc. v. Hill.* Implicit in the language of the *Time Inc. v. Hill* decision is that a plaintiff may not recover for invasion of privacy for a publication on a matter of public interest unless the plaintiff can prove that the statement is false. In *Garrison v.*

Louisiana, 85 S.Ct. 209 (1964), this Court categorically stated that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government." 85 S.Ct. at 216.

This Court's opinion in *Gertz v. Robert Welch, Inc.,* 94 S.Ct. 2997 (1974), which further refined the First Amendment protections articulated in *New York Times Company v. Sullivan,* 84 S.Ct. 710 (1964), indicates that in matters of public interest, recovery for damages from a media defendant rests on a showing of "knowledge of falsity or reckless disregard for the truth" in order to allow breathing space for First Amendment freedoms when reporting on matters of public concern. 94 S.Ct. at 2999. From this authority, it can be inferred that falsity is an essential element of any common law cause of action against a media defendant arising from a publication on a matter of public concern. *See Cox Broadcasting Corp. v. Cohn,* 95 S.Ct. at 1047 (Powell, J. concurring).

With regard to proof of fault, *Gertz* expressly prohibited states from imposing liability upon a media defendant in an action for a defamatory falsehood without proof of some degree of fault. 94 S.Ct. at 3010. More recently, this Court in *Philadelphia Newspapers, Inc. v. Hepps,* 106 S.Ct. 1558 (1986), discussed the role of fault and falsity in cases presenting three different configurations of speech and plaintiff.

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz,* the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure as in *Dun & Bradstreet* [*Inc. v. Greenmoss Builders,* 105 S.Ct. 2939 (1985)], the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1563 (1986).

Regardless of the various interpretations possible for "matters of public concern," the reporting of crime and the criminal process are "without question" matters of public concern. *Cox Broadcasting Corp. v. Cohn,* 95 S.Ct. at 1045. Consequently, the case at bar falls into the second category articulated by this Court in *Philadelphia Newspapers, Inc. v. Hepps.*

Under the standard of *Philadelphia Newspapers,* a private figure plaintiff in a defamation action, seeking to recover damages from a media defendant on a publication involving a matter of public concern, bears the burden of showing falsity as well as fault. The common law's rule on falsity — "that the defendant must bear the burden of proving truth" — must fall to a constitutional requirement that the plaintiff prove both falsity and fault. 106 S.Ct. at 1563.

The desired effect of this Court's holding in *Philadelphia Newspapers, Inc. v. Hepps,* as well as *Gertz v. Robert Welch, Inc.* and *New York Times v. Sullivan,* expressly stated in those decisions, is to allow the press sufficient breathing space in reporting on matters of public concern — an area in which the press not only has a First Amendment right but indeed a "responsibility." *Cox Broadcasting Corp.,* 95 S.Ct. at 1045. That desired effect will be undermined if the decisions of this Court can be circumvented by allowing common law actions for invasion of privacy in which a plaintiff does not have to prove

fault or falsity on the part of a media defendant reporting on a matter of public concern. As this Court at least intimated in *Philadelphia Newspapers,* if not directly held, the Constitution must supplant any common law action when a private figure seeks to recover money damages from a media defendant reporting on a matter of public concern.

In order to insure that the press is able to enjoy the breathing space it needs to fulfill its responsibility to report on matters of public concern, it is imperative that this Court expressly extend the holding of *Philadelphia Newspapers, Inc. v. Hepps* to preclude any common law action which allows a private figure plaintiff to recover damages from a media defendant based on a publication involving a matter of public concern without proving both falsity and fault. Viewed another way, the case presents an opportunity to explain that the Court's holding in *Cox Broadcasting Corp. v. Cohn* protects not only the reporting of information legally obtained from public documents but the reporting of matters of public concern in general. It is of no value to the press to have constitutional safeguards in place with regard to defamation actions when plaintiffs are able to circumvent such safeguards by bringing other common law causes of action under a more relaxed standard of liability.

The chilling effect on the press which would result from allowing common law causes of action for the truthful publication of matters of public interest would deprive the public of their constitutionally protected right to receive such information. Information of a public interest is the most compelling sort of speech protected by the First Amendment. Crime and criminal conduct are indisputably matters of public interest.

> Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning who the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims and those who are closely associated with them.

Restatement (Second) of Torts, § 652D, Comment *f* (1977).

Clearly the constitutional requirements articulated in *Philadelphia Newspapers* and the other decisions of this Court cited above must supplant all state causes of action, including invasion of privacy.

CONCLUSION

The Florida decision is in direct conflict with prior decisions of this Court prohibiting a state from imposing criminal or civil liability upon a media defendant for the publication of truthful information obtained from public documents. The decision is also in conflict with authority of this Court demonstrating that the Florida statute at issue cannot meet constitutional standards since it neither furthers a compelling state interest nor utilizes a means least restrictive of protected First Amendment expression to serve such an asserted state interest. Additionally, the Florida decision conflicts with authority of this Court indicating that a private figure plaintiff seeking damages from a media defendant for the publication of matters of public concern must prove that the statements complained of are false and that the media defendant acted with the requisite degree of fault. These issues are substantial and vital to the

protection of newsgathering activities which the First Amendment and prior decisions of this Court have sought to safeguard. The chilling effect which the Florida statute has on newsgathering activities from public documents and public officials will be felt nationwide. Accordingly, this case merits full consideration by this honorable Court.

For the above stated reasons, Amicus Curiae respectfully requests this Court to note probable jurisdiction in this case, and order briefing on the merits and oral argument.

Respectfully submitted,

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October 14, 1987

JOINT

APPENDIX

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-329

In The

Supreme Court of the United States

October Term, 1988

THE FLORIDA STAR,

Appellant,

vs.

B.J.F.,

Appellee.

On Appeal from the First District Court of Appeal For the State of Florida

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED AUGUST 26, 1987
PROBABLE JURISDICTION NOTED OCTOBER 11, 1988

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Sept. 26, 1984 - Original Complaint filed.

Oct. 26, 1984 - Defendant's, Florida Star, Answer to Complaint filed.

Nov. 19, 1984 - Amended Complaint filed.

Jan. 11, 1985 - Order Denying Motion to Dismiss Amended Complaint filed.

Jan. 11, 1985 - Defendant's, Florida Star, Answer to Amended Complaint filed.

Dec. 11, 1985 - Trial of action commenced.

Dec. 11, 1985 - Judgment of Circuit Court entered.

Dec. 17, 1985 - Amended Final Judgment of Circuit Court entered.

Dec. 23, 1985 - Defendant's Notice of Appeal to First District Court of Appeals filed.

Dec. 24, 1985 - Defendant's Motion for Judgment in Accordance with Motion for Directed Verdict filed.

April 3, 1986 - Circuit Court Order on All Pending Post Judgment Motions entered.

Jan. 23, 1987 - Order of First District Court of Appeals denying Motion for Rehearing and Clarification.

May 28, 1987 - Order of Supreme Court of Florida denying Motion for Rehearing.

Aug. 21, 1987 - Notice of Appeal to the Supreme Court of the United States.

Dec. 14, 1987 - Order of the Supreme Court of the United States remanding matter back to Florida Supreme Court.

Sept. 1, 1988 - Opinion on certified question rendered by the Florida Supreme Court.

Oct. 11, 1988 - Order of Supreme Court of United States noting Probable Jurisdiction

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 84-11791-CA

DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

vs.

DALE CARSON, SHERIFF OF JACKSONVILLE, and the FLORIDA STAR, INC., a Florida corporation,
Defendants.

MOTION TO DISMISS AMENDED COMPLAINT

Defendant, THE FLORIDA STAR, INC., a Florida Corporation, pursuant to Rule 1.140 Florida Rules of Civil Procedure, moves this Honorable Court to dismiss plaintiff's Amended Complaint showing as follows:

1. Plaintiff, alleges that this Defendant, by accurately printing information released to it by the Sheriff of the City of Jacksonville, to wit: the name of a rape victim, violated Section 794.03 Florida Statutes. Plaintiff then demands a sum of money in damages for this alleged violation. Said statutory section being criminal in nature, it is an improper allegation in Plaintiff's civil cause of action.

2. Further, this Defendant is the owner and publisher of a newspaper and a corporation licensed to do business in the State of Florida and is entitled to the privileges and protections of the First Amendment of the United States Constitution applicable to the State through the 14th Amendment of the United States Constitution.

Thus, Plaintiff fails in its Amended Complaint to state a cause of action.

WHEREFORE, the Defendant, THE FLORIDA STAR, INC., for the above listed reasons and applicable case law to be presented at a hearing on this matter, moves this Honorable Court to dismiss plaintiff's Amended Complaint herein.

/s/ Denise M. Prescod
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(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 84-11791-CA

DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

vs.

DALE CARSON, SHERIFF OF JACKSONVILLE, etc., et al.,
Defendants.

ORDER ON MOTION TO DISMISS THE AMENDED COMPLAINT
(Filed January 11, 1985)

Upon consideration, it is

ORDERED:

1. The Motion to Dismiss Plaintiff's Amended Complaint filed by Defendant, The Florida Star, Inc., be and the same is hereby DENIED.

2. The Florida Star, Inc., shall have 10 days from the date hereof within which to file an Answer to said Amended Complaint.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 3rd day of January, 1985.

/s/ LOUIS C. CORBIN
CIRCUIT JUDGE-LOUIS C. CORBIN

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 84-11791-CA
DIVISION: D

BETTY JEAN FREEM,
Plaintiffs,

vs.

THE FLORIDA STAR, INC.
a Florida Corporation
Defendant.

AMENDED ANSWER TO AMENDED COMPLAINT
(Filed December 9, 1985)

COMES NOW, the Defendant THE FLORIDA STAR, INCORPORATED, by and through the undersigned attorney and files this Answer to Plaintiff Amended Complaint and says:

(1) Defendant generally denies each and every allegation of Plaintiff's Amended Complaint.

AFFIRMATIVE DEFENSE

Defendant further defends and alleges that the information was made freely available without restriction to the Defendant and to restrain Defendant from publication is violative of the 1st and 14th Amended of the U.S. Constitution.

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 84-11791-CA

DIVISION: D

BETTY JEAN FREEMAN,

Plaintiff,

vs.

THE FLORIDA STAR, INC.,
a Florida Corporation,
Defendant.

PRE-TRIAL STATEMENT

(Filed December 11, 1985)

Pursuant to the Order for Pre-trial Conference, the parties file this Pre-trial Statement:

(a) *Concise Statement of Nature of the Action:*

Plaintiff, Betty Jean Freeman, sues Defendant, The Florida Star, Inc., claiming that the Defendant is liable to the Plaintiff for damages alleged to have been suffered by Plaintiff. Plaintiff contends that on or about October 29, 1983, the Florida Star, Inc., allegedly identified the Plaintiff as the victim of a sexual attack and described the details of said attack in its newspaper.

(b) *Concise Statement of Admitted Facts:*

(1) Defendant, The Florida Star, Inc., was a Florida corporation licensed to do business in the State of Florida, maintaining its principal place of business in Duval

County, Florida. Said Defendant is the owner and publisher of a newspaper, to wit: THE FLORIDA STAR, which is published in Duval County, Florida.

(2) Plaintiff, Betty Jean Freeman, was the victim of a sexual attack on October 20, 1983, at 6:27 a.m., in Jacksonville, Florida.

(d) *Concise Statement of Issues to be Litigated:*

(1) Does Section 794.03 Fla. Statutes apply?

(2) Did Defendant negligently violate Section 794.03. Florida Statutes?

(3) Did Defendant recklessly and without regard to Plaintiff's peace of mind and right of privacy intentionally violate Section 794.03, Florida Statutes, so as to render Defendant liable for punitive damages?

(4) Plaintiff's damages.

(d) *Proposed Amendments to Pleading:*

Amendment to Defendant's Answer to include affirmative defense.

(e) *Complete Lists of Witnesses and Exhibits:*

Plaintiff's and Defendant's witnesses and exhibit lists are attached hereto.

(f) *Objections to Evidence at Trial:*

To any testimony about the actual sexual battery and to any reference to a phone call received by Plaintiff's mother regarding her daughter's alleged sexual battery.

(g) *Undisposed of Matters:*

DATED this 9 day of December, 1985.

DENISE M. PRESCOD, P.A.

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R.J. BECKHAM

TRANSCRIPT OF PROCEEDINGS
OF DECEMBER 11, 1985

DEFENDANT'S MOTION FOR DIRECTED
VERDICT AT CLOSE OF PLAINTIFF'S CASE

(p.73) THE COURT: Your motion will be denied on that ground. Anything further?

MS. PRESCOD: Yes, Your Honor. Your Honor, there are Constitutional grounds we would argue at this time, one dealing primarily with the statute itself. The statute, Florida statute, I believe 794.03 is a statute that provides criminal sanctions or the accurate publication of the name, address or any identifying information of someone who is allegedly a victim of a sexual assault, and it is defined by the statute dealing with sexual assaults which is also 794. other things.

(p.74) Your Honor, we would – it is clearly from the way that it is written and there is no question about it that the statute would constitute prior restraint and because the statute would constitute prior restraint then it comes before this Court with a heavy burden because it is the burden on any statute that would show a prior restraint. The burden is that it is almost deemed to be unconstitutional absent some showing that it can survive the First Amendment requirements.

The First Amendment requirements for freedom of speech and for free press would transcend an awful lot of other rights which would include the right that this State of Florida seems to feel that it is giving to rape victims by virtue of this statute.

Now, it is a little bit difficult to argue because normally when constitutional arguments are made in this

sense you have the State on the other side presenting why it feels that, you know, in its power it can justify the existence of this particular law and where it feels that the welfare and well-being of its citizens the purpose of the law and purpose for which it was designed. Here we don't have the State to bring forward that information. But what we do have Your Honor, is this: We do know that the statute (p.75) exists and we do know the statute provides criminal penalties. It says you shall not, and if you do, you will be punished for it, and that is prior restraint, and it directs itself specifically to the press.

Now, Your Honor, this is a State statute and even in the argument that there may be some valid reason for the State saying that they have a right to protect their citizens, there are some other things that this statute says. Number one, it is overbroad. Take for example, Your Honor, the fact that this singer, Connie Francis – Connie Francis made news all over America when she was raped in a hotel. I believe she was raped in the elevator. She subsequently sued the hotel, and in suing the hotel, won a judgment.

Under the existing statute, any newspaper printing the name of Connie Francis as a victim of a sexual battery would be in violation of this statute, and yet it is news. It is information that has been made public, and we must remember that this law, 794.03, is specific to Florida and Florida only, and it doesn't limit itself to situations where the information is or is not newsworthy, is or is not published somewhere else. There is case law to the effect that there are certain conditions. As a matter of fact, 794.03 and statutes like it have come up time and time again before (p.76) the United States Supreme Court and

lesser courts and has always been struck down never having had to reach its constitutional significance. So the question as to whether or not it is overbroad and the question as to whether or not the statute is unconstitutional because it is – its prior restraint is a question that the courts have never had to come to when they strike it down, because there are so many other things that they find to be wrong that they never get to the situation to having to address the constitutional issue.

Your Honor, I draw the Court's attention to Cox Broadcasting Company, and Cox Broadcasting Company deals with a Georgia statute that is – and is mentioned in the footnote as being the equivalent of the Florida statute that we are discussing here today. And in that matter they held that a state may not, consistent with the First and Fourteenth Amendment, impose sanctions on the accurate publication of a rape victim's name. In that particular instance, it was obtained from judicial records that were maintained in connection with the public prosecution.

THE COURT: That was information that was made public by a public trial, was it not, Counsel?

MS. PRESCOD: That is correct.

THE COURT: Okay.

(p.77) MS. PRESCOD: And, Your Honor, if that were the only distinction, we – Your Honor, what I would beg to say at this point at least from some of the subsequent case law, even case law that has mentioned Cox, that is not the only distinction as for it being made public by

virtue of public file. Where the information is made public by other means it has also been found that statutes like 794.03 do not apply.

For example, Your Honor, in Oklahoma Publishing Company versus The District Court, cited at 430 U.S. 308, a 1977 case, they struck down the Court injunction that prohibited the news media from publishing the name or photograph of a 11-year-old boy who is being tried before a juvenile court. In that situation there was a statute that prevented – there was a statute at the time in existence that prevented the newspapers, the news media, from printing the names of juveniles who were having proceedings. In that specific situation the juveniles were – excuse me –the reporters were invited in by the Court to hear the trial, and then after they were invited in, the Court informed them that they could not print the information. Your Honor, I think that is a situation that is very similar to this one.

From the testimony we have had today, we know the (p.78) information was information that was not gained illegally. It was information that was legally obtained, and it was not – there has been no testimony as to information that was obtained by bribery or any other under-the-table methods. This is information that was obtained legally. That information being obtained legally was made public when it was given to the press, and that is one of the arguments that they make in Oklahoma Publishing Company. They say even though the statute existed, that this information - that juvenile proceedings were not to be reported by the press. Even though the statute exists where the information is made available, where the press was invited in, where the press was

given that information, you couldn't then turn around and set them up and say they have violated the statute because the statute did not apply in that situation.

Your Honor, what we are saying in this particular situation is that by virtue of our having received the information from the Jacksonville Sheriff's Office by legal means, that since they are the people that determine – they are an arm of the State and they determine whether or not the State has an interest to protect. By virtue of giving out the information, they essentially said, We have no interest to protect apart (p.79) from the statute and therefore that information was information that was available to print. That is absent the fact that we had a policy and absent the fact as to whether or not we intended to because testimony has already elicited that it was something that was done by error, but the mere existence of a statute is not sufficient.

Your Honor, I am moving from the fact of the constitutionality of the statute as a whole to the fact that if even this Court deemed that there was a basis for the statute itself to be held constitutional in this matter before this Court that statute does not apply and the reason that statute does not apply is because the information was made public, the information was accurate and the information was made public by those persons who, if there were a right to be protected by the statute, would be the guardians of that right, and if the state, as guardians of that right, say that here is the information, then they essentially made that information – not only have they made that information public, they have decided that the right no longer applies.

Your Honor, if I may also cite to the Court a situation in Landmark Communications versus Virginia which is cited at 435 U.S. 829.

(p.80) THE COURT: What was the year of that, please?

MS. PRESCOD: Court's indulgence.

THE COURT: That is all right, Counsel. I didn't mean to unduly prolong your argument. Proceed.

MS. PRESCOD: Thank you, Your Honor. That was the situation where the – where there again existed a statute that did not allow for the publishing of – in this case it was the information before the Judicial Review Commission. And the information was published. The Court found that that was the situation of prior restraint and that the newspaper's right of freedom of the press superseded any right – any interest that the State may have had, and at that time the State was asserting that the integrity of the bench was at stake.

Your Honor, I can only assume that in the State's providing this statute that they are either trying to protect some right that the victim may have towards anonymity. However, in a situation where there is a less intrusive means for doing that, then, the State is required to in view of the balancing that must be made between the newspaper's right of freedom of the press and the right that is being - the protection that the State is seeking to do because of the immense burden they have to overcome, so certainly if it can be done by less intrusive means, then that is the matter by (p.81) which it must be done.

Your Honor, this particular statute, if it is attempting to protect the anonymity of the victims, then that should be done in this situation by providing that the police department and those persons who are custodians of those kinds of records not make that information available to the press, and that would be a less intrusive means by which the State may accomplish the same manner. However, Your Honor, in this matter where that information is freely given to the press and then the State seeks to tell the press that no matter how you got it, no matter whether you got it through normal report of means, our right to protect our citizens then supersedes your right to print. I suggest they have not used the least intrusive means, and in not using the least intrusive means, Your Honor, I do think we can safely say the statute then has not risen to the level where it should supersede the constitutional right my client has to freedom of the press and freedom to print information that he has gained by normal report of means legally and printed accurately.

THE COURT: Mr. Beckham. As I understand your argument, in essence, you are contending that the Statute 794.03 is unconstitutional as being an undue (p.82) infringement upon the First Amendment rights of your client; is that correct?

MS. PRESCOD: That is correct, Your Honor.

THE COURT: Thank you. Mr. Beckham.

MR. BECKHAM: Your Honor, if I may get the statute book. I would like to address the last point that she made first because indeed the Sheriff's Department is under the same injunction as any other citizen by the statute and

indeed the Sheriff was a defendant in this case until the Sheriff settled and got out as a joint tort feasor, if you will.

794.03 says, "No person shall print, publish or broadcast or cause or allow to be printed, published or broadcasted in any instrument of mass communication the name, address or other identifying fact or information of the victim of any sexual offense." Within that chapter . . . "So that the Sheriff's Office by causing or allowing to be printed, published or broadcasted is equally at fault with the defendant who, indeed, did print, publish or broadcast." So the statute covers both of them and it is indicative of the public policy of the State to try to protect the identity of people unless it becomes a matter of public record, and the Sheriff is not the one who decides whether it is a matter of public record.

(p.83) We have furnished Your Honor with cases of Baby Jane Doe and the other case was Williams where our appellate courts here have construed the Cox Broadcasting case and also referred to an Attorney General's opinion which states, "Until and unless the victim's name becomes a matter of public record in a public proceeding, the statute still is viable."

We have no evidence as to how the Florida Star came in possession of the news item. We know that my client reported it to the Sheriff, and we know that ultimately it ended up in the newspaper, but there is no evidence at this point how they came in possession of it. But even assuming the evidence is susceptible of the inference that the police gave it to them, the statute certainly does not

authorize the police department or Sheriff to waive the requirements that the Legislature has imposed.

THE COURT: Do you have anything further on that point, Ms. Prescod?

MS. PRESCOD: Yes, Your Honor. Your Honor. Your Honor, in Smith – Robert K. Smith versus Daily Mail Publishing Company which is at 99 Supreme Court – excuse me, 443 U.S. 97.

THE COURT: That is a United States Supreme Court decision?

(p.84) MS. PRESCOD: Yes, Your Honor, it is. It is a 1979 case. Your Honor, that's a situation where there was at the time a statute that said that the names of juveniles involved in criminal activity could not be printed unless there was some prior release by the courts, and in that particular situation apparently two newspapers, one of whom they had responded to a situation where a juvenile was charged with killing someone, one newspaper printed the name of the child and then subsequent to that printing in referring to it on a later occasion the other newspaper then printed the name of the child. Now, that situation was a situation where it was not a matter of public record because it had become any part of judicial proceedings. It was a matter of public record because it happened and the press was there and they knew about it. And that was the situation where the Court found that despite – well, number one, they found that the statute was unconstitutional, but they found that you cannot restrain the press from printing information that they know about already, and this is the situation.

And counsel argues that because the police were not doing the right thing when they gave the information – the information was already made public and being made public doesn't require that it is made public by (p.85) virtue of a judicial proceeding. When the information – and there are countless other cases that say whether you get this – there are cases that indicate, Your Honor, where journalists have, through listening to police band radios arrived at the scene, gotten information by normal report of methods from the other people who were there asking for names and then printing those names, that information then is public information. If the information is public, the press has the right to print it.

In this particular situation, Your Honor, the Jacksonville Sheriff's Office, when they made the information available, made the information public, and by making the information public, the press had a right to print it.

THE COURT: Does that conclude your argument?

MS. PRESCOD: Yes, Your Honor.

THE COURT: On that argument the Court specifically rules that Statute 974.03 is constitutional. I take into consideration the First Amendment rights of the press, but I also take into consideration the recent decisions about Florida appellate courts which have stated without equivocation that those First Amendment rights must be ballast to some extent within the realms of propriety against the rights of privacy of the (p.86) citizens. I do not feel that the statute is overly broad. I think it is restricted to the rather narrow provisions of Section – of Chapter 794 of the Florida statutes which deals with a rather

sensitive area of criminal offenses. Your motion on that ground will be denied.

Any further grounds to your motion now, Counsel?

MS. PRESCOD: No, Your Honor.

THE COURT: Bring the jury in, please, Mr. Bailiff.

* * *

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT CLOSE OF DEFENDANT'S CASE AND PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON ISSUE OF NEGLIGENCE

(p.122) THE COURT: All right. I understand there are motions to be presented to the Court at this time of the trial proceeding.

MS. PRESCOD: Your Honor, on motions of directed verdict made at the close of the plaintiff's case, the plaintiff mentioned that the information had not come to the Court as to how the Florida Star came by the information it printed. Now that the defense has rested, the Court has had an opportunity to hear exactly how that information came to the Florida Star. And having heard that it is very important because the case law cites it as important to know that the information that was presented was, one, accurate, but more importantly come by by lawful means.

So the Florida Star has essentially testified as to the source of its information and the source of its information was the Duval Sheriff's Office. They testified that information was available and that it was sitting out in the

open on a desk in the press room, a place that you don't need a press pass to get to. You just walk in the door of the Sheriff's office. You walk into the room. There is at no points someone that checks you and the information is out and available.

That being the case, the State can hardly claim that –

(p.123) THE COURT: We are not talking about the State now. We are talking about the plaintiff.

MS. PRESCOD: Well, Your Honor, the State has got to come into this, and the reason the State has got to come into this is because that is the only manner by which this plaintiff has the right of action. And that is – the plaintiff's complaint is premised solely on that statute, 794.03, as the basis by which they have access to this defendant.

THE COURT: All right.

MS. PRESCOD: And is the grounds for their suit. Therefore, the constitutionality of 793.04 in and of itself and as it applies to this case, as it applies to this defendant, is important.

THE COURT: Just a second. Do I understand your contention to be that simply because the Sheriff's Office made these reports available to reporters in a press room thereby converted the information to open public records with access to the public and therefore your client should be held not responsible for publishing the information?

MS. PRESCOD: Well, Your Honor –

THE COURT: Is that the gist of the argument?

MS. PRESCOD: Essentially but not quite.

THE COURT: All right. Proceed.

(p.124) MS. PRESCOD: Essentially but not quite because, Your Honor, as we had mentioned in – if the Court will bear with me – in Oklahoma, the case that we cited in our prior argument to the Court it was a situation where there was a statute that did not allow for the press to publish the names of juveniles. The courthouse in which the hearing was held was not open to everyone. The press were invited in, and when the press were invited in, they heard the name of the juvenile and subsequently went out and printed that information, and the Court in ruling on that indicated that information was thereby made public and the proceedings themselves were not open to everyone but the press had been invited in and some certain numbers of the public had been invited in, but it was by invitation.

THE COURT: You mean the Court issued invitations specifically to the press?

MS. PRESCOD: The Court, yes, Your Honor.

THE COURT: Or did the Court simply allow the press to attend the trial?

MS. PRESCOD: Your Honor, the case law itself makes reference to them being invited.

THE COURT: That is a new procedure to me, but go ahead.

(p.125) MS. PRESCOD: Yes, sir. Your Honor, in this particular situation the information was made available to the press and because it was not of a situation where there is a sign on the door that says "Public at large come

in" doesn't make it any less not public information because it's only the press.

There has been no testimony as to an agreement between the press and Sheriff's Office not to print any of this information or that any of this was confidential. Therefore, the information, if it was sitting there in the press room available to the press, made available by the Sheriff's Office which is an arm of the State, then the Sheriff's Office can be deemed to have made that information public.

But even apart from that argument there is this argument: Inasmuch as the newspaper has a right to freedom of the press and inasmuch as any statute such as this one which involves prior restraint must show that they have a need to protect their citizenry that goes beyond and that protection has got to be something specific. As I said, we are in a difficult situation because the State is not here to explain exactly what right or what interest it is they claim and they are protecting. But if it is the interest of a victim that the State has claimed to be protecting, when the State (p.126) drops the ball, then the State has decided that there is no interest to protect. And that's what I am saying here today. When the Sheriff's Office gave that – made that information available to the press, then in essence there was no interest to protect because the State itself decided there was no interest to protect.

THE COURT: Are you here advocating the proposition that the Sheriff's Office in the future and all times henceforth absolutely prohibit the press from looking at certain police reports?

MS. PRESCOD: Your Honor, the police report is not the question. The question specifically here deals with the name and that is –

THE COURT: The name was contained in the police report.

MS. PRESCOD: That's –

THE COURT: What you are saying what she should have done is say, no, Mr. Press, you cannot look at this police report?

MS. PRESCOD: Your Honor, if the State had an interest sufficient to allow it to protect, then they could very easily had given either the narrative or the information without the name, marked through the name, if they are making that information available, but when they make all of the information available, it is not (p.127) the job of the press to determine what information the public should have. The press determines what is and what isn't newsworthy and what they are and are not going to print, but that the press is under some obligation to protect the citizenry, the answer to that is no. That burden – and Cox states it very succinctly that if there is a burden to bear for the protection of the citizenry, that burden lays squarely on the State. Your Honor, in this matter here the State – the State of Florida, by its legal arm, the Sheriff of Duval County, gave up that information and therefore has got to be deemed to have decided that there was no interest in this matter to protect.

In addition to that, Your Honor, we would argue that again the statute is overbroad and that is one of our constitutional attacks on the statute, and the statute has

got to be able to hold up for itself, because the statute is the entire premise for this suit.

Under the statute, the revelation that Paula Hawkins made that she had been sexually assaulted as a child is illegal to print.

THE COURT: Paula Hawkins is a public official and the law pertaining to public officials, people in the public eye, is completely different from a private citizen.

(p.128) MS. PRESCOD: Your Honor, the statute makes no distinction. The statute still makes it illegal and one would question whether or not that statute supersedes the case law regarding public officials. However, Your Honor, that information may have been available to press in any number of other states, but with this statute in existence it still would have been illegal to print in the State of Florida, and any paper publishing that information risked criminal offense in the State of Florida.

There is no question but that this statute as it is written and as it is applied here today, if it were to be followed to the letter by all of the press, all of the media in the State of Florida, there would be information that would probably be beneficial to this country that would not be available because the State has claimed an interest, and they claim that their interest is such that their interest may supersede those First Amendment rights of the media as a whole whatever that interest is, because that interest has been unstated; whatever that interest is.

Whenever a state is alleging an interest of such prime importance that it must be weighed against one of our constitutional rights, then the State has got to show that

the manner in which it wishes to protect that (p.129) interest is the less intrusive means possible. If the less intrusive means possible here means that the Sheriff's Office does not provide that information, that is certainly less intrusive than to request that the press not print any of it for fear of criminal prosecution.

Therefore, Your Honor, I would argue that the statute is unconstitutional in and of itself. It is further unconstitutional as applied in this instance because in this instance the State itself made the information available.

When it made the information available, it did one of two things. It either decided that there was no interest in this cause to protect or certainly meant the media could assume that by receiving the information from the State that the State had deemed there was no interest worthy of its protection or that the information was public knowledge.

Your Honor, I think that those are arguments that have to be seriously considered in connection with this lawsuit because this lawsuit is not a lawsuit that concerns itself with any right to invasion of privacy other than one provided by the statute. It is not a lawsuit that concerns itself with any other right other than a right provided for it by 794.03. And that (p.130) being the case the constitutionality of 794.03 and how it comes into play in this case is incredibly important. Therefore, Your Honor, I think that we should be entitled to a judgment – a directed verdict, excuse me, Your Honor, in connection with this cause on at least those grounds.

Now, I have other grounds to argue but –

THE COURT: Why don't you argue all of your grounds. At this time we will cover the whole spectrum.

MS. PRESCOD: Okay. Your Honor, I would again argue that we would be entitled to a judgment – a directed verdict, excuse me, in connection with our prior motion in limine. Our prior motion in limine we had asked the Court that Mr. Beckham not be allowed in his opening to make reference about telephone calls received by the plaintiff's mother and not to allow that testimony to come before the jury because that information had no bearing on whether or not we had violated the provisions of 793.- – excuse me, 794.03 nor did it have any bearing on this client and her pain and suffering since she was not the person to hear the information.

Now, pain and suffering put on her by her mother by relaying information that got relayed to her by somebody she doesn't know is pain and suffering that (p.131) this jury has been allowed to hear that has not come from us.

THE COURT: Is this in the nature of a motion for directed verdict or in the nature of a belated motion for mistrial, Counsel?

MS. PRESCOD: Perhaps Your Honor, both.

THE COURT: Well, be specific for the record, please.

MS. PRESCOD: For the record, both. It is both. Both a motion for mistrial as well as a motion for directed verdict because I believe that information has come before this jury that should not have come before the jury.

In addition to that, Your Honor, I think – because we would again renew our argument that since the grounds upon which this lawsuit is brought are based on 794.03

and because whenever an action is brought for violation of a law it may give the plaintiff a right of action in negligence but not a separate right of action for violation of privacy or any other of those general things because there is none in this circumstance.

The action as brought under 794.03 is a negligence action. Being a negligence action the fact that plaintiff did not provide any testimony as to a physical injury that was a manifestation of the emotional pain (p.132) and suffering that she suffered in connection with the publication that she is not entitled to a verdict for plaintiff.

We think that we would be entitled to a directed verdict because that information does not appear and this is very clearly a negligence action. I would have nothing further, Your Honor.

THE COURT: Mr. Beckham, let me hear you on the motion.

MR. BECKHAM: Your Honor, I think first of all we have to acknowledge that there were indeed two partners at the dance. The Sheriff's Office was implicated. The Sheriff's Office was originally a defendant in this case because it was implicated, but simply because there are two people wrong doesn't make one of them right. And certainly the Sheriff's Office or deputy of this office here in this Courthouse cannot waive the public policy of the State as determined by the Legislature and as pointed out in the statute making it a crime. The mere fact that the Sheriff's Office permits people to commit criminal acts doesn't keep the act from being criminal.

Now, in this case we have the recognition by the Legislature in the public records law which is Chapter 119 of Florida Statutes where it specifically on two (p.133) different occasions notes the precise language that is referred to in the statute in question, the 794.03. For instance, it says that the name, sex, age and address of a person arrested or as a victim of a crime that is owed to the public except as provided in 119.073H and you look back to there and it says the following thing is exempt. "Any criminal intelligence investigation or criminal investigative information including the photograph, name, address or other fact or information which reveals the identity of the victim of any sexual battery as defined by Chapter 794 or child abuse Chapter 827 is exempt from the provisions of Subsection 1." It is specific recognition again by the Legislature of the policy that is being served.

Now, we have a plea by counsel claiming a waiver, but the reporter didn't claim that she thought she was entitled to print this, that she thought she was entitled to print this. She said she goofed. The reporter didn't claim there was any waiver. She said she knew she wasn't supposed to print it, so I don't find in this case to where anybody is relying upon any waiver. That is secondary except for the proposition there can't be any waiver in any event.

We have a negligence claim. We have a violation of the statute which is negligence per se and that is (p.134) why we will be making a motion for directed verdict on the issue of the defendant's negligence, and that is why my charges as drafted include a preemptory charge to the effect that the defendant here is guilty of negligence. That

is in line with the standard jury Instruction 4.9 which is violation of a nontraffic penal statute. But that is getting the cart before the horse at this time. My motion has not been argued.

THE COURT: I heard the argument of prospective counsel on the motion to various grounds. Do you wish to add something, Ms. Prescod?

MS. PRESCOD: Yes, Your Honor, I do.

Your Honor, if I may, it's an additional motion. It directs itself to 794.03.

Your Honor, I think there's a requirement that someone find that we violated 794.03 and in order to do that I think that 794.03 would need to have been introduced in trial. Now, I understand that the Court can take judicial notice of it, but since the Court was not asked while the case was open to take judicial notice of 794.03, then I think that it is therefore impossible to find that we violated it, and that is additional grounds for directed verdict, Your Honor.

THE COURT: Do you wish to be heard on that?

(p.135) MR. BECKHAM: No, Your Honor.

THE COURT: It is my conception that the proper procedure to be followed, if an alleged violation of a State statute is involved, would be if the matter is presented to the jury, the jury would be instructed by the Court that a certain statute was in full force and effect at the time of the occurrence of this incident, and that statute reads as follows – the Court would then instruct the jury on the language of the statute. And then the jury would be left

to make a determination as to whether that statute has been violated under proper instructions by the Court.

Now, if a municipal ordinance is involved, you are correct that a copy of the ordinance must be introduced into evidence, but that is not true of a State statute.

The Court will deny all motions presented at this time.

Now, are there any motions to be presented by the plaintiff?

MR. BECKHAM: Yes, Your Honor. As I noted a moment ago, I move the Court to, in line of my request of Instruction No. 3, to grant a directed verdict for the plaintiff on the issue that by publishing the information that was published the defendant is guilty (p.136) of negligence per se according to the law as contained in the standard jury instruction sheet.

THE COURT: And specifically what standard jury instruction are you referring to, Counsel?

MR. BECKHAM: Well, as Your Honor just noted, if this were a matter to be left to the jury, Your Honor would then give the charge which is 4.9. I am asking the Court to grant a directed verdict on the issue you won't charge the jury. I am simply pointing out the authorities of the charge or the authorities – it is uncontested here that they published it. It is uncontested what the law is, and it is uncontested that they publish it, so I think it is a matter of law they have committed negligence per se.

THE COURT: Ms. Prescod.

MS. PRESCOD: Your Honor, if I may respond. Your Honor, since the case law further defines specifically 794.03 such that in the instances where the information is made public that 794.03 does not apply as in Sarasota – Jane Doe versus Sarasota-Bradenton, Florida Television Company, Incorporated which is at 436 So.2d 328.

There are situations when even though the information is public it is not a violation of the law and so to say that because the information is published (p.137) it is a violation of the law I don't think that the Court can find without making some findings of fact as in for one, that the information was not made available, was not public information. I think that is a finding of fact that is a prerequisite to finding whether or not by printing the information we had violated that statute, and so I would oppose plaintiff's motion for a finding automatically that by virtue of printing it we have violated the law.

There are instances as the case law shows when this law does not apply, and I do think the manner in which we came by the information and the fact that the information was made public requires some specific findings of fact prior to coming to the conclusion that it is therefore a violation of 794.03.

THE COURT: Again, do you contend that the fact that the Sheriff by furnishing this information in the nature of reports to the reporter of the Florida Star thereby converted this information into public information?

MS. PRESCOD: Yes, Your Honor. And if I may, I think that the – in Smith v Daily Mail it was a situation where the press received from eyewitnesses and from the police

the name of a juvenile and therefore printed the name of a juvenile. That was a kind of (p.138) situation similar to this one where the police gave the information to the press, whether or not one can claim – I mean – and the information was printed prior to there being a judicial proceeding concerning the matter and prior to there being any other dissemination of that information and that information was deemed to have been made public information legally obtained by normal report of methods and therefore the press was allowed to print it, and that is why I am contending that by making this information available it is normal report of means if by asking for the information you receive it, normal report of means lawfully obtained, there was no bribery. I think that we are in a similar situation.

THE COURT: And you say that that excuses the defendant here from any obligation under the statute prohibiting the publishing of the information?

MS. PRESCOD: Well, under Smith v Daily Mail which is a United States Supreme Court case at 443 97 – excuse me, 443 U.S. 97 it excused the publishing company from the requirements that they not print that information. If I may, Your Honor –

THE COURT: Let me see that decision, Counsel.

All right. I have read the case of Smith versus Daily Mail Publishing Company. I have at least read the majority opinion. I haven't read the occurring (p.139) opinions, but it seems that the issue was an extremely narrow issue in this case, and I do not believe that the facts in this case would bring it within the perview of the United States Supreme Court case which has been cited. I will adhere to

my ruling that the motions of the defendant are denied and under the laws of the State of Florida as enunciated in the comments to stand a jury Instruction 4.09 I believe it is – which are to the effect that the violation of the penal statute cannot be left to the decision of the jury as to whether or not that statute has been violated. I will grant the plaintiff's motion for directed verdict on the issue of negligence. And I will appropriately instruct the jury. Now, the jury is scheduled back in in five minutes. It is going to take us a little while to settle the charges of this case, so Mr. Bailiff, when the jury comes in, tell them that we will be with them just as quickly as we possibly can. I did not anticipate it would take this length of time to argue the motions, but I am going to give everybody about a five-minute break and ask you to appear in my chambers, and Miss Court Reporter, if you will be with the attorneys at that time, we will settle the charges and then come back for final arguments.

(Recess)

* * *

CHARGES TO THE JURY

(p.168) THE COURT: Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict in this case.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact and to

apply the law to the facts as you find them from the evidence.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his believability to remember the matters about which he testified, and the reasonableness of his testimony considered in the light of all the evidence in the case and in the light of your own experience and common sense.

The Court has determined and now instructs you, as a matter of law, that the defendant was negligent. The issue for your determination on the compensatory damage claim of the plaintiff is whether such negligence was a legal cause of loss, injury or damage sustained (p.169) by plaintiff.

If the greater weight of the evidence does not support the claim of the plaintiff, then your verdict should be for the defendant, the Florida Star, Incorporated.

Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

Negligence is a legal cause of loss, injury or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury or damage, so that it can reasonably be said

that, but for the negligence, the loss, injury or damage would not have occurred.

In order to be regarded as a legal cause of loss, injury or damage, negligence need not be the only cause. Negligence may be a legal cause of loss, injury or damage, even though it operates in combination with some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such loss, injury or damage.

If you find for the defendant, the Florida Star, in this case, you will not consider the matter of damages at all. But, if the evidence proves negligence of the defendant that was a legal cause of injury to plaintiff, (p.170) Betty Jean Freeman, you should award to the plaintiff, Betty Jean Freeman, an amount of money that the greater weight of the evidence shows will fairly and adequately compensate her for such loss, injury or damage including such damage as she is reasonably certain to incur or experience in the future. You shall take into consideration the following elements:

Any pain and suffering, mental anguish and loss of capacity for the enjoyment of life experienced in the past by the plaintiff or to be experienced in the future. There is no exact standard for fixing the compensation to be awarded on account of such elements of damages. Any such award should be fair and just in the light of the evidence in the case.

If you find for the plaintiff, Betty Jean Freeman, and find also that the defendant, the Florida Star, acted with reckless indifference to the rights of others, you may, in

your discretion, assess punitive damages against the defendant as punishment and as a deterrent to others.

Your verdict must be based on the evidence that has been received and the law on which I am now instructing you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or (p.171) against any party.

When you retire to the jury room, you should select one of your number to act as the foreman or forewoman as the case may be to preside over your deliberations and sign your verdict. Your verdict must be unanimous. That is, your verdict must be agreed to by each of you.

You will be given two forms of verdict which I will now read and explain to you.

If in this case you find for the defendant, The Florida Star, your verdict will be in the following form. It bears the name of the Court, the case number, the name of the parties and it's entitled Verdict. It reads, "We, the jury, find for the defendant, The Florida Star, Incorporated. So say we all" meaning that that is a unanimous decision. "Dated this 11th day of December, 1985." And then there is a signature line for your foreman or forewoman to sign.

If your verdict in this case should be for the plaintiff, your verdict form will be in the following form. Again, it bears the name of the Court, the case number, the names of the parties and it's entitled Verdict. And it reads, "We, the jury, find for the plaintiff, Betty Jean Freeman, and against the defendant, The Florida Star, Incorporated,

and assess her compensatory (p.172) damages in the amount of" and then there is a dollar sign and a blank space in which you would insert the amount of any compensatory damages you would find. "And assess punitive damages against the defendant in the amount of" and then there is a dollar mark and a blank space and there you would insert the amount of any punitive damages you would assess in this case. "So say we all" again meaning you have all agreed. "Dated this 11th day of December, 1985." Signature line to be signed by your foreman or forewoman.

So you all understand these verdict forms?

THE JURORS: (Nodding heads affirmatively)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 84-11791-CA

DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

vs.

THE FLORIDA STAR, INC.,
a Florida corporation,
Defendant.

VERDICT
(filed December 11, 1985)

We, the jury, find for the Plaintiff, Betty Jean Freeman, and against the Defendant, The Florida Star, Inc., and assess her compensatory damages in the amount of $75,000.00 and assess punitive damages against the Defendant in the amount of $25,000.00.

SO SAY WE ALL. Dated this 11th day of December, 1985.

/s/ Clifford J. Ainsworth
Foreman or Forewoman

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 84-11791-CA

DIVISION: D

BETTY JEAN FREEMAN,
Defendant/Appellant,

vs.

BETTY JEAN FREEMAN,
Plaintiff/Appellee

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT

Defendant moves to set aside the verdict rendered in the above-styled action and the judgment entered herein on December 11, 1985 and amended on December 17, 1985 and moves to enter judgment in accordance with its motion for directed verdict at the close of the evidence on the grounds then stated.

/s/ Denise M. Prescod
DENISE M. PRESCOD, ESQUIRE
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Jacksonville, Florida 32202
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(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

NO. 84-11791-CA DIVISION: D

BETTY JEAN FREEMAN,
Plaintiff,

-vs-

THE FLORIDA STAR, INC.,
Defendant.

ORDER ON ALL PENDING POST JUDGMENT MOTIONS
(Filed April 3, 1986)

The attorneys for the respective parties having been heard and the attorney for the plaintiff having waived the necessity for the posting of a supersedeas bond pending appeal and the Court being fully advised, it is

ORDERED AND ADJUDGED:

1. Defendant's Motion to Stay Execution of Judgment is hereby granted and issuance of Writ of Execution on the judgment heretofore entered in this cause is hereby stayed until decision is reached by the appellate courts.

2. Defendant's "Motion For Rehearing and Motion For New Trial", "Motion For Judgment in Accordance With the Motion For Directed Verdict" and "Motion For Remittitur" (all filed on December 23, 1985) are not ruled upon by this Court since the defendant simultaneously with the filing of said motions and on December 23, 1985 filed a Notice of Appeal in this cause, thereby divesting this Court of jurisdiction to hear and determine the aforesaid motions.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 3rd day of April, 1986.

/s/ John S. Cox
CIRCUIT JUDGE

Copies:

R. J. Beckham, Esquire
Denise M. Prescod, Esquire

APPELLANT'S BRIEF

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-329

In The

Supreme Court of the United States

October Term, 1988

THE FLORIDA STAR,

Appellant,

vs.

B.J.F.,

Appellee.

On Appeal from the First District Court of Appeal For the State of Florida

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

(1) May the State of Florida, consistent with the First and Fourteenth Amendments of the United States Constitution, impose civil and criminal sanctions upon a newspaper for the publication of lawfully obtained, truthful information found in government records?

(2) Assuming *arguendo* that the State of Florida can impose such sanctions under some circumstances, does the imposition of strict liablility for the publication of lawfully obtained, truthful information found in government records unconstitutionally chill the exercise of a newspaper's fundamental First Amendment freedoms?

LIST OF PARTIES

The appellant is The Florida Star, Inc., a corporation incorporated in Florida with its principal place of business in Jacksonville, Florida. The appellee is Betty Jean Freeman.

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The opinion of the Florida Supreme Court on the Certified Question from the United States Supreme Court, answering in the affirmative that the Florida Supreme Court had jurisdiction pursuant to Article V, Section 3 (b) (3) of the Florida Constitution, is reported at 530 So.2d 286 (1988). The order of the United States Supreme Court Certifying and Remanding the above question of state jurisdiction to the Florida Supreme Court is reported at ___ U.S. ___, 108 S.Ct. 499 (1987). The order of the Florida Supreme Court which denied review of the Florida First District Court of Appeal decision is reported at 509 So.2d 1117 (Fla. 1987). It was reprinted in the Appendix to the Jurisdictional Statement at A1. The judgment of the Florida First District Court of Appeal is reported at 499 So.2d 833 (Fla. 1st DCA 1986). It was reprinted in the Appendix to the Jurisdictional Statement at A2-A3. The trial court order which granted judgment for the appellee is not reported but was reprinted in the Appendix to the Jurisdictional Statement at A5-A6.

JURISDICTION

The Supreme Court of Florida entered an order on May 28, 1987 denying discretionary review of a Florida First District Court of Appeal judgment and prohibiting any motion for a rehearing. (A1 of the Jurisdictional Statement). The First District Court of Appeal had affirmed the trial court judgment, which held that § 794.03, *Fla. Stat.* (1987) was valid and not repugnant to the United States Constitution. On August 21, 1987, Florida Star filed its Notice of Appeal from the First District Court of Appeal within ninety days from entry of the order denying Appellant's Petition for Discretionary Review by the Florida Supreme Court. Florida Star filed its Jurisdictional Statement on August 26, 1987.

On December 14, 1987, the United States Supreme Court certified a question to the Florida Supreme Court asking whether the Florida Supreme Court had had jurisdiction when it had declined review of the case. On

September 1, 1988, the Florida Supreme Court answered the certified question in the affirmative, ruling that it had jurisdiction when Appellant had initially petitioned it for review and holding that its order denying Appellant's Petition for Discretionary Review had exhausted Florida Star's state remedies. The United States Supreme Court entered an order noting probable jurisdiction on October 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2)[1] as an appeal which draws into question the validity of § 794.03, *Fla. Stat.* (1987) on the ground that it is repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I: "Congress shall make no law- . . . abridging the freedom of speech or of the press. . . ."

U.S. Const. amend XIV, § 1: " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law;. . . ."

STATUTORY PROVISIONS INVOLVED

§ 794.03 *Fla. Stat.* (1987):

> **Unlawful to publish or broadcast information identifying sexual offense victim.** – No person shall print, publish, or broadcast, or cause or allow to be printed, published or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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[1] On June 27, 1988, Congress repealed 28 U.S.C. § 1257, replacing this Court's appellate jurisdiction over state court judgments with certiorari jurisdiction. 28 U.S.C. § 1257, June 27, 1988, P.L. 100-352, § 32, 102 Stat. 662. By virtue of its savings clause, this revision does not affect the jurisdiction of the Court in this case. *Id.* at § 7.

STATEMENT OF THE CASE

The plaintiff sued the Duval County Sheriff[2] and the appellant, a weekly newspaper publishing company serving the black community of Jacksonville, Florida, with an average circulation of approximately 18,000 copies. (Tr.T. 46-47).* The Sheriff settled, and the case against the newspaper proceeded to a one-day jury trial. By a directed verdict for the plaintiff on liability, the defendant newspaper was held civilly liable *per se* for the violation of a criminal statute, § 794.03, *Fla. Stat.* (1987). (J.A. 29-30).** Although § 794.03 is strictly criminal in nature, providing that it is a second degree misdemeanor to publish or cause or allow to be published the name of a victim of any sexual offense, the trial court allowed the plaintiff to proceed on an implied civil cause of action. The trial court denied Florida Star's motion for a directed verdict on the grounds that the statute was repugnant to the First Amendment both on its face and as applied. (J.A. 32-33). B.J.F. asked the jury for $18,000 in punitive damages, and unspecified actual damages (Tr.T. 150).[3]

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*T.Tr. – refers to trial transcript of Dec. 11, 1985 proceedings.

**J.A. – refers to Joint Appendix consented to by all parties.

[2] The plaintiff sued "Dale Carson, Sherift of Jacksonville" although no such position exists. By virtue of Art. VIII, § 1(d), Florida Constitution, the electors in each county elect a sheriff, so Mr. Carson's position was that of Sheriff of Duval County, where the city of Jacksonville is located. This anomaly in the caption and pleadings continued until the Sheriff settled with the plaintiff and was dropped from the suit.

[3] The complaint filed by the plaintiff and all trial court pleadings refer to the plaintiff by her full name. All appellate papers filed with the Florida First District Court of Appeal also refer to her by her full name. It was not until that court, *sua sponte*, changed the caption of the case that reference to the plaintiff was by her initials "B.J.F." The Florida Star v. B.J.F., 499 So.2d 883 (Fla. 1st DCA 1986). Since the case proceeded with that style, the appellant will continue the convention established by the First District Court of Appeal.

The jury awarded $75,000 in compensatory damages and $25,000 in punitive damages upon the trial court's instruction that it could award punitive damages if the Florida Star "recklessly disregarded the rights of others." (J.A. 35-36, 38). The Court set off the Sheriff's $2,500 settlement against the $75,000 actual damage award.

The facts of this case are as follows. In October 1983, B.J.F. reported to the Duval County Sheriff's Department[4] that she had been robbed and sexually assaulted by an unknown assailant. (Tr.T. 27). The Sheriff's Department released a report on the incident, which fully named B.J.F., by placing the report in the Department's press room. (Tr.T. 108-09). The Duval County Sheriff's Department places no restrictions on who may enter the press room or who may read the incident reports placed in that room for inspection. (Tr.T. 93).

After the report was placed in the press room, Florida Star reporter-trainee Jacqueline Lotson went to the press room (Tr.T. 93) to obtain that information for publication in the newspaper's "Police Reports" section. That section is two to three pages of brief articles reporting on local criminal incidents investigated by the Duval County Sheriff's Department. (Tr.T. 47). The reporter-trainee followed the newspaper's routine practice for obtaining information to be printed in that section of the newspaper. As always, she copied the incident report verbatim, including B.J.F.'s name, on a blank form that is a duplicate of the same forms used by the Sheriff's Department. (Tr.T. 108-11). The reporter-trainee then returned to the Florida Star's office and placed the form in a bin. She had no further involvement, beyond simply copying this information, in the preparation of the story.

Girtha Morgan, a Florida Star reporter and paste-up worker, took this incident report and prepared a squib about the crime. Although it was the newspaper's self-imposed policy not to publish the names and addresses of victims of sexual offenses, the reporter inadvertently

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[4] *See* n.2, *supra*.

failed to delete B.J.F.'s name. (Tr.T. 47-48, 100). The story appeared in the "Robberies" section of "Police Reports" because the writer stated that she viewed the incident as a robbery. (Tr.T. 100).

> The full text of the article was:
> [B.J.F.] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence. (GNM).

(Appendix To Jurisdictional Statement A-14).

The appellee, using her complete name in the caption, filed suit against both the Sheriff and the Florida Star. She pleaded an implied cause of action for negligence *per se* against the Florida Star for violating § 794.03, *Fla. Stat*. The appellee neither pleaded nor proved the elements for common law invasion of privacy. The case proceeded solely on an implied cause of action based upon the penal statute. (Appendix to Jurisdictional Statement at A7-A10).

The Florida Star moved for a directed verdict at the close of the plaintiff's case on the ground that this application of § 794.03, *Fla. Stat*. violated the First Amendment of the United States Constitution. (J.A. 9-19).[5] The trial court denied the motion and specifically upheld the constitutionality of the statute. (J.A. 18-19).

> THE COURT: On that argument the Court specifically rules that Statute 974.03 [sic] is constitutional. I take into consideration the First Amendment rights of the press, but I also take into consideration the recent decisions about Florida appellate courts which have stated without equivocation that the First

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[5] The constitutional question was first raised prior to trial as an affirmative defense, (J.A. 5), and by motion to dismiss the complaint, which the trial court denied. (J.A. 2).

> Amendment rights must be ballast [sic] to some extent within the realms of propriety against the rights of privacy of the citizens. I do not feel that the statute is overly broad. I think it is restricted to the rather narrow provisions of Section – of Chapter 794 of the Florida Statutes with deals with a rather sensitive area of criminal offenses. Your motion on that ground will be denied. (J.A. 18-19).

The Florida Star renewed its motion for a directed verdict at the close of its defense. (J.A. 19-27). The trial court again denied the defense motion. Moreover, the trial court granted B.J.F.'s motion for a directed verdict at the close of evidence, on the issue of negligence *per se* and, therefore, removed any determination of the Florida Star's culpability from the jury. (J.A. 29).[6] The only issues given to the jury were causation, (J.A. 34), and damages – compensatory and punitive. (J.A. 35-36). By taking the question of fault from the jury, and directing a verdict of negligence *per se*, the trial court in essence fashioned a previously unrecognized strict liability cause of action for truthful publication.

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[6] The trial court accepted B.J.F.'s argument that "it is uncontested what the law is and it is uncontested that they publish[ed] it, so *I think it is a matter of law they have committed negligence per se.*" (J.A. 30) (emphasis added).

The trial court ruled:

> THE COURT: . . . All right. I have read the case of Smith versus Daily Mail Publishing Company. I have at least read the majority opinion. I haven't read the occuring [sic] opinions, but it seems that the issue was an extremely narrow issue in this case, and I do not believe that the facts in this case would bring it within the perview [sic] of the United States Supreme Court case which has been cited. I will adhere to my ruling that the motions of the defendant are denied and under the laws of the State of Florida as enunciated in the comments to stand a [sic] jury Instruction 4.09 I believe it is – which are to the effect that the violation of the penal statute cannot be left to the decision of the jury as to whether or not that statute has been violated. I will grant the plaintiff's motion fo direct [sic] verdict on the issue of negligence. (J.A. 32-33).

The First District Court of Appeal affirmed the trial court's final judgment. In its one paragraph ruling on the First Amendment issues in the appeal, the intermediate appellate court ruled that the appellee's name was private and the publication was forbidden as a matter of law under § 794.03, *Fla. Stat.* 499 So.2d at 884. (Appendix to Jurisdictional Statement at A2-A3).

The Florida Star filed a Petition for Discretionary Review in the Supreme Court of Florida on the grounds that the First District's decision expressly declared § 794.03, *Fla. Stat.* to be valid, and that the decision expressly construed provisions of the Federal Constitution. The Supreme Court of Florida denied review.

On direct appeal to this Court, the following question was certified back to the Florida Supreme Court:

> Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, § 3(b) (3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?

The Florida Star v. B.J.F., ___ U.S. ___, 108 S.Ct. 499 (1987).

The Florida Supreme Court answered in the affirmative, 530 So.2d at 287, and on October 11, 1988, this Court noted probable jurisdiction.

SUMMARY OF THE ARGUMENT

This case involves sanctions against a newspaper for publishing truthful information lawfully obtained from a government press release. The plaintiff's civil cause of action for invasion of privacy is based solely upon a Florida statute which represents a legislative predetermination prohibiting a category of publication regardless of circumstances. Here, the newspaper printed information of public record which concerns a matter of public interest – the commission of a crime.

The Florida statute imposes criminal sanctions for this prohibited expression, and from this statute the trial

court fashioned a strict liability theory of negligence *per se*.

At the very least, *Cox Broadcasting Corp. v. Cohn* and its progeny establish that truthful publication of information lawfully obtained by the press may not be subject to such sanctions.

More fundamentally, the statute here and its implied civil cause of action effectuate a constitutionally impermissible prior restraint. Such sanctions are subject to the strictest of constitutional scrutiny. In our constitutional system which values a free marketplace of ideas and information, and abhors prior restraint, this case demonstrates the ultimate First Amendment proposition that truthful speech cannot be punished.

Finally, the imposition of punitive damages and strict liability violates established constitutional principles.

ARGUMENT

I

THE STATUTE, WHICH IMPOSES CIVIL AND CRIMINAL PENALTIES FOR PUBLISHING TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM A GOVERNMENT RECORD, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

A. *COX BROADCASTING V. COHN* MANDATES REVERSAL.

1. This case is indistinguishable in all critical respects from *Cox Broadcasting*.

As in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the unfortunate victim of a sexual assault has sued a news organization for publishing identifying information lawfully obtained from the government. The policy considerations present in *Cox Broadcasting* apply equally here. The First Amendment cannot tolerate state-imposed restrictions upon publication of the truth, particularly where the government itself is the source of the information, even though the information is "confidential" by statute.

In *Cox Broadcasting*, the victim was a minor and died as a result of the incident. Here the adult victim survived. In *Cox Broadcasting* a major metropolitan newspaper learned the victim's identity from the judicial branch of the government by obtaining copies of indictments during a recess in the perpetrators' trial, and through other newsgathering efforts.[7] The indictments clearly identified the victim by name. Here the weekly community newspaper obtained the information from the executive branch of government. The sheriff's office released a criminal incident report to its press room (the very purpose, obviously, was to inform the public through the press). Like the *Cox Broadcasting* indictments, this report identified B.J.F. by name.

Section 794.03 of the Florida Statutes is certainly coextensive with the Georgia statute at issue in *Cox Broadcasting*, and, if anything, broader.[8] The privacy interest at stake in *Cox Broadcasting* was that of the deceased victim's father; here it is that of the plaintiff-victim. Florida law finds that distinction insignificant to the constitutional

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[7] There is at least a suggestion that the reporter obtained some information from the executive branch of government by observing prisoner transfers. *Cox Broadcasting*, 420 U.S. at 472-73, n.3.

[8] The Georgia statute did not extend to persons who "cause or allow" publication. The Georgia statute was confined to identifying "any female who may have been raped or upon whom an assault with intent to commit rape may have been made." *Cox Broadcasting*, 420 U.S. at 471, n.1. The Florida statute prohibits publication of identifying information as well as name, and is gender neutral. However, the Florida statute apparently covers only actual victims, not those who "*may have been raped . . .* " as was provided by Georgia law. *Ibid.* With respect to this latter distinction, the Florida law does not resolve the question of when a person's status as "victim" is determined (given the presumption of innocence prior to conviction), or the question that logically follows

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analysis. *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2d DCA 1983).

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from acquittal of the alleged perpetrator (acquittal based on consent of the victim could logically differ in effect from acquittal based on a defense of misidentification of the defendant).

Several states have enacted statutes for the purpose of protecting the identity of sexual offense victims from public disclosure. There are no reported cases involving criminal prosecution under any of these statutes.

When this Court decided *Cox Broadcasting*, four states, including Florida, directly criminalized media publication of the names of sexual offense victims. *See* Ga. Code Ann. § 16-6-23 (1988); S.C. Code Ann. 16-3-730 (1976); Wis. Code Ann. § 942.02 (1987).

After the decision in *Cox Broadcasting*, the Georgia Legislature revised its statute to exclude "truthful information disclosed in public court documents open to public inspection." Ga. Code Ann. § 16-6-23(c). The Wisconsin statute was repealed, effective March 27, 1976, presumably in response to this Court's ruling. South Carolina still prohibits publication by the media (excluding publications made by order of the court) and provides for criminal penalty upon violation. S.C. Code Ann. 16-3-730.

Other state statutes that provide for confidentiality of a sexual offense victim's identity differ substantially from § 794.03, Fla. Stat. (1987) and the Georgia and South Carolina statutes. For the most part, these statutes regulate the conduct of administrative officials and court employees who initially receive or have access to the victim's identity. These officials are charged with the responsibility of keeping the victim's name out of the public record. *See* Ill. Ann. Stat. ch. 38 § 1453 (1988) (directed to law enforcement and court records concerning child victim's identity); Me. Rev. Stat. Ann. tit. 30, § 508 (1988) (addresses district attorneys, their assistants and employees and other law enforcement officials concerning minor victims, repealed by the legislature effective March 1, 1989 by 1987 Me. Laws c. 737, § A,1.); Mass. Ann. Laws ch. 265 (§ 24C) (Michie/Law Co-Op. 1988) (provides for

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2. The First Amendment values recognized in *Cox Broadcasting* apply equally here.

The Court's holding in *Cox Broadcasting* is applicable here: "In preserving [our democratic] form of government, the First and Fourteenth Amendments command

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confidentiality in court and police records, publication or disclosure punishable by fine); Minn. Stat. Ann. § 609.3471 (West 1988) (addresses records or reports relating to complaints, indictments or petitions); 42 Pa. C.S.A. § 5988 (Purdon 1988) (disclosure of child victim's name prohibited by officers or employees of the court and provides that violation by any person constitutes a misdemeanor); R.I. Gen. Laws § 11-37-8.5 (1988) (addresses court records and state or local government agencies concerning child victims); Tenn. Code Ann. § 37-1-612 (Supp. 1988) (concerns confidentiality in records and reports regarding child sexual abuse, violation by any person constitutes a misdemeanor under § 37-1-615); Tex. Code Crim. Proc. Ann. art. 57.02 (Vernon 1988) (addresses confidentiality of public files and records through use of pseudonym); Wyo. Stat. § 6-2-310 (1986); Wyo. Stat. § 14-3-106 (1988) (both statutes address public employees and violation by any person punishable by fine or imprisonment, or both).

Although several of these statutes provide criminal penalties for violations by any person, they nonetheless focus on protecting information in the possession of the government. Essentially, the burden is placed on government personnel, rather than the press, to prevent disclosure. The Texas legislature has been particularly innovative by providing statutory guidelines for the victim to choose a pseudonym. Pseudonym forms are distributed to law enforcement agencies which contain the victim's name, address, telephone number and the chosen pseudonym. This pseudonym is used in all public files and records, including judicial records, press releases, and police summary reports. Tex. Code Crim. Proc. Ann. art. 57.02. Clearly, this procedure places the burden of confidentiality on law enforcement officials, and accomplishes the purpose of keeping the victim's identity withdrawn from public view without unconstitutional restraint on the press.

nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records." 420 U.S. at 495.[9] This rule cannot be distinguished by the fact that the Florida Star relied on official police records, rather than official judicial records, because both are matters of public record lawfully obtained by routine newsgathering techniques.[10]

As in *Cox Broadcasting*, the Florida Star's news report concerns a matter of public interest – the commission of a crime – that involves the actions of government, is of concern to a self-governing people, and is within the responsibility of the press to report. *"The commission of crime,* prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operation of government." *Cox Broadcasting*, 420 U.S. at 492 (emphasis added).

States may not punish publications drawn from the official record of the government's response to a matter of public interest (a police incident report here, an indictment in *Cox Broadcasting*) once the government's information is released to the public domain. The characterization of these sources as "public" records is inexorably linked to the public interest in the communication and receipt of such information. "Public records by their very nature are of interest to those concerned with

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[9] Recently, the North Carolina Supreme Court has wholly rejected the tort of embarrassing private facts invasion of privacy on the ground that this "would add to the existing tensions between the First Amendment and the law of torts and would be of little practical value to anyone." Hall v. Post, ___ S.E.2d ___ No. 340PA-87, slip op. (N.C. Oct. 6, 1988).

[10] The Florida Attorney General attempted to distinguish court records from other sources of information in 1975 Op. Att'y Gen. 75-203 which was cited by the First District below. *Florida Star*, 499 So.2d at 884. The Attorney General did not have benefit of this Court's subsequent decisions which expanded the scope of *Cox Broadcasting*. *See* pp. 14-18, *infra*.

the administration of government, and the public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting*, 420 U.S. at 495.

In citing the Restatement (Second) of Torts § 652B, comment c (1977), the *Cox Broadcasting* Court noted, " 'There is no liability for the examination of a public record concerning the plaintiff. . . .' According to this draft, ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions." *Cox Broadcasting*, 420 U.S. at 494.[11] The Court went on to characterize "public records" as "official records available to the public." *Id.* at 494 n.25. In support of this position, the Court cited cases similar to this case that involved media disclosure of sensitive information obtained from public records.[12]

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[11] *See also* Restatement (Second) of Torts, § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution (1977) (there can be no recovery for disclosure of and publicity to facts that are a matter of public record).

[12] In Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959), for example, the newspaper printed information obtained at the Governor's press conference concerning the arrest of six men. The news media was advised of the charges by the Governor's legal assistant and the head of the State Law Enforcement Division, and enforcement officers distributed copies of photographs taken of the men. *Id.* at 673. The court found no privacy invasion, and recognized the method by which the newspaper received its information to be "of relevance and significance in deciding the question." *Id.* at 675.

In Edmiston v. Time, Inc., 257 F. Supp. 22 (S.D.N.Y. 1966), the published information concerned an alleged rape victim's prior sexual promiscuity. The magazine obtained its information from a court opinion which referred to statements made by the alleged victim to a detective sargeant of the county police. *Id.* at 25-26. The court held the information was privileged because a New York law barred libel actions for true

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3. Subsequent decisions reinforce and extend *Cox Broadcasting*.

Recognizing that the public interest inheres in information about government, and is not limited to information derived from purposeful, official government disclosures, the Court has subsequently extended First Amendment protection to publication of information lawfully obtained during what, by statute, should have been a closed juvenile proceeding. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310 (1977), *citing Cox Broadcasting*. Thereafter, the Court extended constitutional protection to information obtained by routine newsgathering techniques. The Court reversed the imposition of sanctions similar to those of § 794.03, *Fla. Stat.* where the press identified a juvenile after learning this information

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publication of judical proceedings. *Id.* at 24-26. The court also found that "common law privilege" barred a cause of action for privacy invasion. *Id.* at 27.

The New Mexico Supreme Court addressed this issue in Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962). That case involved a newspaper article which discussed the sexual assault by a boy against his younger sister. *Id.* Affidavits supplied by the publisher and the reporter who furnished the information demonstrated that the facts had been obtained from juvenile court records. *Id.* at ___, 368 P.2d at 148. The court granted summary judgment in favor of the publisher, on the ground that the article was privileged. *Id.* at ___, 368 P.2d at 149.

Similarly, the South Carolina Supreme Court found no right of privacy violation when a newspaper printed an article concerning the birth of a child whose mother was twelve years old. Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). The court recognized the public interest, and pointed out that the age of the parents is required on the birth certificate, a public record. *Id.* at ___, 95 S.E.2d at 610. The court found it to be of "little significance" that the article was published prior to the filing of the certificate. *Id.*

by monitoring routine police radio frequencies and by interviewing witnesses at the scene of a crime. *Smith v. Daily Mail Publishing Co.*, 433 U.S. 97, 102 (1979), *citing Cox Broadcasting*.[13]

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[13] *See* Houchins v. KQED, Inc., 438 U.S. 1, 10 (1978) "The government cannot restrain communication of whatever information the media acquires – and which they elect to reveal."

Lower courts have held, based on *Cox Broadcasting*, that information declared confidential by statute, but inadvertently made part of a public file, becomes part of the public record for purposes of the media's privilege to disseminate it. In Howard v. Des Moines Register, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980), for example, medical records indicating that an institutionalized 18-year-old girl had been sterilized, which were confidential pursuant to statute, had been forwarded from the custodian to the Governor's office and made part of a non-confidential file of complaints against the agency authorizing the sterilization. The court ruled that the document lost its confidentiality once the Governor accepted custody of it, and therefore, the press did not invade the girl's privacy when it published the contents.

Similarly, in Montesano v. Donrey Media Group, 99 Nev. 644, 668 P.2d 1081 (Nev. 1983), *cert. denied*, 466 U.S. 959 (1984), the Nevada Supreme Court held that confidential records regarding a minor, which had been inadvertently included in the public court record, had become part of the public record within the meaning of *Cox Broadcasting*. Likewise, in Boettger v. Loverro, 349 Pa. Super. 134, 502 A.2d 1310 (1986), *appeal granted*, 514 Pa. 627, 522 A.2d 566 (1987), the court ruled that a newspaper could not be punished by civil damages for disclosures resulting from the negligence of custodians of confidential records. There, the plaintiff sued the newspaper based on a statute providing a civil cause of action in favor of persons aggrieved by public disclosure of intercepted oral communications, when the newspaper published a story using confidential transcripts of wiretaps that were inadvertently left in a file open to the public. *See also* Poteet v. Rosewell Daily Record, Inc., 92 N.M. 170, 584 P.2d 1310 (N.M. App. 1978) (dismissal of invasion of privacy claim for accurate publication of rape victim's name, learned from a criminal complaint, and published after a preliminary hearing).

These cases emphasize that lawfully obtained information may not be restrained by legislatively predetermined sanctions or by judicial injunction. In *Daily Mail*, the Court summarized the *Oklahoma Publishing* holding to be that "once the truthful information was 'publicly revealed' or 'in the public domain,' the court could not constitutionally restrain its dissemination," 443 U.S. at 103. The *Daily Mail* Court continued that "[i]f the information is lawfully obtained, as it was here, the state may not punish its publication except where necessary to further an interest more substantial than is present here." *Id.* at 104.

In an age when the news media have become the eyes and ears of the people, *Cox Broadcasting*, 420 U.S. at 491-92, the law reflects strong policies encouraging and protecting news media reports derived from government records.[14] These reports are considered highly valuable, and they clearly contribute to the core First Amendment value of informing citizens about actions of their government. Thus, news reports based on official records,

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[14] Lower courts have recognized that records generated by the executive branch of state government are of public concern. *See, e.g.*, Jones v. Taibbi, 400 Mass. 786, 512 N.E. 2d 260 (1987) (since fact of arrest must be recorded by police, it is of public concern); Kilgore v. Younger, 30 Cal. 3d 770, 180 Cal. Rptr. 657, 640 P.2d 793 (1982) (plaintiff had no privacy interest when named in report generated by The Organized Crime Control Commission, a branch of the California Department of Justice, because report was public record and of public concern); Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (1986) (*Cox Broadcasting* dispositive on issue of confidential evaluation by the California State Bar Commission on Judicial Nominees regarding qualifications of candidate for judicial office). *See also* Medico v. Times. Inc., 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (information concerning plaintiff's activities culled from confidential FBI documents; "[p]ublic records by their very nature are of interest to those concerned with the administration of government and thus privileged in libel context").

including police records, are made privileged by the common law of libel,[15] and, indeed, Florida has developed an elaborate Public Records Act which makes government records publicly available to the end of fully, accurately and timely informing its electorate.

Generally, this law squarely places upon government the obligation of deleting information deemed private. *See* § 119.07(2)(a), *Fla. Stat.* (1987). Certainly relying upon government documents is a "routine newspaper reporting technique" in the rubric of *Daily Mail*, 443 U.S. at 103. It is a technique which fosters accurate, timely news reporting to provide vital information about government to a self-governing people. Now, Florida proposes a new jurisprudence which renders this once-safe form of news reporting risky. While this case is based on a prior restraint statute, the logic of this case extends to acknowledging each of some 310 exceptions to Florida's Public Records Act disclosure as a legislative declaration of forbidden speech of a "private nature and not to be published as a matter of law." 499 So.2d at 884.[16] One recent decision in Florida, citing this case, has explicitly done so. *Cape Publications, Inc. v. Hitchner*, 514 So.2d 1136 (Fla. 5th DCA 1987), *rev. granted*, ___ So.2d ___, 13 Fla. L.W. 65 (Fla. April 14, 1988). The chilling effect on a free press and consequent constriction of the free flow of vital information about the government to its electorate are self-evident.

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[15] Thus, publications based on agency records, including police records, are privileged. *See, e.g., Medico v. Time, Inc., supra*, (FBI records); Porter v. Guam Publications, Inc., 643 F.2d 615 (9th Cir.), *cert. denied* 454 U.S. 940 (1981) (IRS records).

[16] This potential exposure to liability borders on the absurd. Among documents exempted from the disclosure provisions of The Public Records Act, Chapter 119, are information on persons interested in ridesharing, § 119.07 (3)(1); accident reports involving motor vehicles and boats, § 316.066 (4) and § 327.30 (3); saltwater products wholesaler reports, § 370.07 (5)(a); identities of persons owing child support,

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4. It is the government's responsibility to maintain the confidentiality of its information, and this responsibility may not be shifted to the press through prohibitions on publication.

The government may not shift to the press its own responsibility to keep information confidential. "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Cox Broadcasting*, 420 U.S. at 496.[17] A State is limited to this remedy by *Cox Broadcasting* and cannot remedy its own mistake by punishing a publisher which obtained the information lawfully through normal channels of newsgathering. In *Cox Broadcasting*, the Court said:

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§ 409.257; and, information as to quantity, quality, source or disposition of milk or milk products or results of inspections or tests thereof, § 502.222. The 310 exemptions to the disclosure provisions of the Public Records Act are scattered through the 960 chapters of the Florida Statutes. *See* Vol. 10, *Florida's Government-In-The-Sunshine Manual And Public Records Law Manual*, Office of the Attorney General, at 89-131 (1987).

[17] In Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978), the Court noted, "Moreover, much of the risk can be eliminated through careful internal procedures . . . ." *See also* A. Bickel, *The Morality of Consent* 80 (1975):

> [G]overnment may guard mightily against serious but more ordinary leaks, and yet suffer them if they occur. Members of Congress as well as the press may publish materials that the government wishes to, and is entitled to, keep private. It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values – privacy or public disclosure – which are ultimately irreconcilable. If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press and in Congress.

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.

420 U.S. at 496.[18] If the press cannot rely upon lawfully obtained, public records but must face possible criminal and civil liability for publishing information that was heretofore considered privileged, self-censorship will surely follow. The chilling effect of § 794.03 is clear.

B. THE PRESS MAY NOT BE MADE CRIMINALLY OR CIVILLY LIABLE FOR PUBLISHING THE TRUTH.

This case presents an opportunity to apply precedent subsequent to *Cox Broadcasting* in recognition of the fundamental First Amendment proposition that truthful publication may never be civilly or criminally punished. Truth is the ultimate goal of a system of free expression. The measure for the constitutional value of speech has been expressed by this Court in terms of whether the speech was "a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Nonetheless, the *Cox Broadcasting*

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[18] *See* Romaine v. Kallinger, 109 N.J. 282, 537 A.2d 284 (1988) ("many cases similarly recognize facts contained in a public court record can be published without liability, even when the information may be embarrassing or normally considered 'private,' because the court record places the facts in the public arena"); Dresbach v. Doubleday, 518 F. Supp. 1285, 1290 (D.D.C. 1981) ("republication of matters which are in the public record of the trial and related procedings, no matter how private or offensive, as information contained in the public record is absolutely privileged").

Court declined to "address the broader question whether truthful publications may ever be subject to civil or criminal liability consistently with the First and Fourteenth Amendments . . . " notwithstanding Justice Powell's concurring observations in that case to the contrary. *Cox Broadcasting*, 420 U.S. at 491. *See also Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967).

While this Court has avoided the most fundamental constitutional question posed by privacy law sanctions against truthful speech, the Florida First District Court of Appeal in essence has attempted to answer the question in the negative, asserting that legislatively predetermined areas of prohibited speech are wholly withdrawn from the marketplace of ideas by the imposition not only of criminal penalties but of automatic, strict liability sanctions in unpredictable amounts, determined by jury damage awards.[19]

Whether the publication at issue here is considered in terms of its place in the marketplace of ideas and information, or as the subject of prior restraint in conjunction with the civil and criminal sanctions of § 794.03, the conclusion is the same. No state interest in individual privacy suffices to penalize truthful publication. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

1. In a free marketplace of ideas and information, truthful publication may not be punished.

The First Amendment's central purpose is to facilitate "the common quest for truth." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984). Categories of

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[19] *See infra*, n.26. In New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964), the jury awarded "damages of $500,000, the full amount claimed," even though "Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel." *Id.* at 260. Here, damages were awarded in excess of the amount requested upon an equally thin evidentiary base.

unprotected speech are defined by their lack of contribution to that process:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been though to raise any constitutional problem. These included the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a *step to truth* that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (emphasis added).

This Court's fundamental First Amendment analysis focuses on the distinction between false facts and false ideas. Recognizing that there is no such thing as a false idea, the Court's opinions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), leave to the marketplace of ideas the process of correcting ideas by the competing impact of other ideas. The contrasting premise is that the First Amendment affords lesser protection for false statements of fact. In the closely related field of libel, the recognition that "there is no constitutional value in false statements of fact," *Gertz*, 418 U.S. at 340, implies the converse – that the Constitution does indeed value and protect true statements of fact. It would be anomalous now to say that the Constitution does not always afford protection for true statements of fact.

Contemporaneous with *Sullivan*, in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court struck down a Louisiana criminal libel statute which permitted prosecution of true statements. Noting that "the ascertainment of truth" is the purpose of public debate, the Court determined that " . . . the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 73. This analysis led to a definitive rule: "Truth may not be the subject of either

civil or criminal sanctions where discussion of public affairs is concerned." *Ibid.* Likewise, in *Landmark Communications*, 435 U.S. at 833-38, the Court ruled that a series of state policies served by confidentiality in judicial inquiry and review commission proceedings were insufficient to overcome the First Amendment interests inherent in truthful publication about governmental matters. Moreover, *Landmark Communications* extends First Amendment protection for publication of truthful information to circumstances where the information is "withheld by law from the public domain," even where the lawfulness of the press' source is not clear. *Id.* at 840.

Specifically, in the "Pentagon Papers" case, the dissenting members of this Court each noted the newpaper did not legitimately possess the classified documents.[20] That fact, however, was not even mentioned in the Court's *per curiam* rejection of an injunction to publication, despite the Government's assertion that national security was at stake. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The logical assumption to be drawn from these cases is that a tainted information source will not diminish the Constitution's solicitude for the truth. Even in the area of commercial speech, this Court has rejected as "highly paternalistic" state regulation preventing dissemination of "concededly truthful information" about drug prices because government is "fearful of that information's

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[20] New York Times Co. v. United States, 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting) ("the purloined documents"); *id.* at 754 (Harlan, J., dissenting) (are "the newspapers entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired"); *id.* at 759 (Blackmun, J., dissenting) ("The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession").

effect." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In this context, the Court concluded, "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us." *Id.* at 770.[21]

Very recently this Court reiterated its marketplace analysis to protect ribald, hyperbolic satire. In *Hustler Magazine v. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 879 (1988), the Court started with the view that "at the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."

Indeed, as ideas and beliefs come and go, are proven or disproven, are in or out of favor, our experience leads resolutely to the conclusion that it is far more important to protect the system of freedom of expression itself than to enshrine presently held mores or values by strict rules prohibiting or automatically punishing speech and debate about information which is "not to be published as a matter of law." *The Florida Star v. B.J.F.*, 499 So.2d 883, 884 (Fla. 1st DCA 1986).

> As Justice Holmes wrote "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . "

Falwell, 108 S.Ct. at 879, *citing Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

In a totalitarian society with an ultimate objective of controlling the ideas and beliefs of its people, the clear means to that end is the control of factual information

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[21] *See also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Carey v. Population Service Int'l, 431 U.S. 678 (1977).

generally available. One specific technique is governmental insinuation into the editorial process. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).[22] The power to withdraw certain facts from public debate is the power to censor.

Ideas are shaped by knowledge – by factual phenomena observed and evaluated by the thinker. A society committed to the freedom of ideas must necessarily be committed to the free flow of information unimpeded by governmental regulation or interference of any kind. As John Stuart Mill has observed: "Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it." J.S. Mill, *On Liberty* 19 (1947).

This Court has repeatedly rejected the proposition that the government may prohibit the expression of certain facts or ideas merely because they are offensive.

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the market place of ideas."

FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978), *reh'g denied*, 439 U.S. 883 (1978). "It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969).

In its constantly recurring marketplace-of-ideas metaphor, the Court envisions public debate as a truth-seeking process. While "false statements of fact are particularly valueless" because "they interfere with the truth-seeking function of the marketplace of ideas," *Falwell*, 108 S.Ct. at 880, the Court nevertheless concludes that strict liability for such valueless remarks is prohibited because of its chilling effect on the process itself. Accordingly, false statements are protected by a proof requirement far different from strict liability, i.e. a burden of proof placed upon the plaintiff requiring a showing of both falsity and a showing of the "requisite level of culpability." *Ibid*. Recently, the Court expressed a presumption favoring speech over reputation, where proof of truth or falsity is in doubt. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)[23]; *see also Sullivan*, 376 U.S. at 272.

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[22] According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, where news and editorial content is concerned. New York Times Co. v. United States, 403 U.S. 713 (1971). . . . We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purpose of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures which would allow government to insinuate itself into the editorial rooms of this Nation's press.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring), *citing* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[23] In *Hepps*, the Court allocated the burden of proof of falsity to private figure plaintiffs in libel litigation, in preference to a defense burden of proving truth. The Court premised this ruling on a constitutional requirement to give preference to truthful publication:

> . . . where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

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It would be ironic indeed to allow breathing room for the valueless statements of false fact, and yet impose strict liability for public debate of *true* facts because a legislature has categorically predetermined that such discussion is "of a private nature and not to be disclosed as a matter of law." *The Florida Star*, 499 So.2d at 884.

In a marketplace of ideas which deems false statements of fact particularly valueless but nevertheless subject to protection against a chilling effect imposed by government sanctions, the ultimate conclusion is inescapable – truthful publications may not be enjoined by prior governmental determination. Any such prior restraint declares entire subject areas off limits to public debate regardless of a case-by-case assessment of the public interest. To allow such a regulation of an otherwise free marketplace of ideas admits no limiting principles upon which such regulation of the market could rest.[24]

2. Section 794.03 operates as a legislative prior restraint imposing criminal and implied civil sanctions for publishing lawfully obtained, truthful information.

In function and effect, the legislative prior restraint here is nearly identical to a classic, Blackstonian prior

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Id. at 777. The dissent did not quarrel with the proposition that where governmental restriction of speech is proposed, government should "at a minimum shoulder the burden of proving that the speech is false and must do so with sufficient reliability that we can be confident that true speech is not suppressed." *Id.* at 787 (Stevens, J., dissenting).

[24] *Cf.* Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, 765 (1976). The free marketplace of information is directly linked to our free enterprise economy. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions . . . . to this end the free flow of commercial information is indispensable."

restraint by judicial injunction. Most fundamentally, each restraint is an *a priori* determination by government that factual information should not be published. The determination is inextricably linked to a governmental judgment about content. Thus, government insinuates its judgment for that of editors in determining the content of the news. Each mandate has the force of law, and is enforced by the threat of punishment, including monetary fine and incarceration. Like an injunction, the statute here by its terms, and the judicial gloss given it below, imposes near automatic punishment for publishing the forbidden facts. If anything, as this Court has recognized in *Smith v. Daily Mail Publishing Co.*, 433 U.S. 97 (1979), a legislative prior restraint is comparatively broader and harsher. It does not provide an opportunity to be heard before or close in time to imposition of the restraint. It does not allow the speaker or publisher to plead in mitigation or justification. In the end, the restraint at issue here allows no mechanism to balance competing interests, no opportunity to narrowly tailor its scope or duration, and no means to ensure that the restraint will achieve its purpose. This legislative prohibition on truthful speech is as broad as it is permanent. The only meaningful distinction is that a legislative prohibition on speech and press requires prosecution by the executive branch of government.[25]

In evaluating similar sanctions imposed by a similar statute, this Court indicated that " . . . [w]e need not decide whether, as argued by respondents, [the West Virginia statute] operated as a prior restraint because a

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[25] The Court has indicated that legislative and judicial prior restraints impose the same limitations in a free marketplace of information, differing only by degree. "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

similar constitutional analysis applied." *Daily Mail*, 443 U.S. at 102.

Section 794.03 nonetheless operates as a legislatively mandated prior restraint. The statute reflects the Florida Legislature's prior, categorical determination that publication of a class of information is perpetually prohibited – "not to be published as a matter of law." *The Florida Star*, 499 So.2d at 884. While § 794.03 does not operate as a classic prior restraint by judicial injunction, the statute by its express terms imposes "a penal sanction for publishing lawfully obtained, truthful information" which the Court has analyzed under prior restraint standards that "require the highest form of state interest to sustain its validity." *Daily Mail*, 443 U.S. at 101-02. The civil sanctions uniquely inferred from the statute here are no less daunting to a small, weekly newspaper than a criminal prosecution.[26] "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Sullivan*, 376 U.S. at 227. The civil/criminal dinstinction is not meaningful where First Amendment guarantees are imperilled, insofar as "chilling" of vigorous reporting may result.

Most significantly, § 794.03 represents the Florida Legislature's attempt to regulate media content. Prior restraint is never content neutral. As here, prior restraint

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[26] Publishing a newspaper can be a hazardous occupation, indeed, for the unwary. The civil judgment entered against The Florida Star here is 200 times greater than the maximum $500 fine provided by the criminal statute upon which the suit is based. This lack of notice and indeterminate legal exposure renders risky the most routine newsgathering from heretofore safe and reliable sources. The Court in *Sullivan* noted this effect: "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Sullivan*, 376 U.S. at 277. The inhibition, of course, is upon the public discourse protected by the First Amendment and is no less severe whether it springs from large judgments or criminal indictments or prior restraints. *See Daily Mail* and *Oklahoma Publishing*.

involves a governmental judgment that specific information should be restrained from public knowledge. In *Tornillo*, 418 U.S. at 256, the Court addressed a different Florida statute which, like § 794.03, "exacts a penalty on the basis of the content of a newspaper." The Court found this statute unconstitutional because it "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258. Equally, the Florida Legislature should not be allowed to edit newspapers through the dictates of § 794.03.[27]

Finally, this statute is not only a predetermination by the legislature of prohibited areas of speech and press, but also imposes a blanket prohibition similar to that invalidated by this Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). *See also Boos v. Barry*, ___ U.S. ___, 108 S.Ct. 1157, 1163 (1988). The holding in this case invests the legislature with the unfettered power to determine which facts are of legitimate public interest and concern without regard to the circumstances of their publication – in effect, legislative regulation of the content of press reports.

This asserted power to censor the news media contravenes the principal purpose of the First Amendment guarantee of a free press, which is to guard against government censorship of the press. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Therefore, "[a]ny

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[27] In Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1971), *reh'g denied*, 414 U.S. 881 (1973), the Court pointed out, "[n]or, *a fortiori*, does our decision authorize any restriction whatever whether of content or layout. . . ." In the same case, Justices Stewart and Douglas, in dissent, expressed the same view that no "government agency – local, state or federal – can tell a newspaper in advance what it can print and what it cannot." *Id.* at 400 (Stewart, J., dissenting).

prior restraint on expression comes to this court with a heavy presumption against its constitutional validity." *Id.* at 558.

Only in the most extraordinary circumstances may the First Amendment guarantees be suppressed. Indeed, as this Court noted in quoting Jefferson in *Nebraska Press*, a free press " 'cannot be limited without being lost.' " *Ibid.* The underlying assumption of this Court's traditional prior restraint analysis presupposes a threat, itself of sufficient constitutional magnitude, that might warrant a demonstrably effective but narrowly-drawn infringement upon First Amendment guarantees. If the proven threat is not of sufficient constitutional magnitude, the First Amendment must prevail. For example, if the threat is to the very existence of the Republic, this Court might well tolerate otherwise intolerable actions of government, such as a temporary suspension of habeas corpus or the silencing of dissident publishers. Even then, such an act is so repugnant to our constitutional scheme of participatory self-governance as to "caution against suspending explicit guarantees." *Nebraska Press*, 427 U.S. at 561.[28]

The Court has never upheld a prior restraint on pure speech. When confronted with such a restraint in the "Pentagon Papers" case, the Court held, *per curiam*, that newspapers could not be prohibited, even during a time of armed conflict in Viet Nam, from publishing documents that were classified "TOP SECRET," even though they were obtained without permission and possibly as a result of the news source's criminal conduct. *New York Times Co.* ("Pentagon Papers"), 403 U.S. 713. The Court held that the press was privileged to print the contents of the documents despite the government's argument that publication of the documents would cause grave, irreparable injury to the nation.

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[28] This is not to say that all speech may be restrained or punished only in the presence of a competing constitutional interest (pornography, e.g., may be restrained on a lesser standard), but this is certainly true of discussions of public affairs or matters of public concern. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

Similarly, in *Nebraska Press*, the Court struck down an order restraining the news media from publishing accounts of a defendant's confession to several murders, even though the purpose of the order was to protect the defendant's Sixth Amendment right to a fair trial. The Court noted that government restraint of news can impose immediate and irreversible harm and that even slight delays in dissemination of news when mandated by government authority impose serious consequences. 426 U.S. at 560-61.

C. THE STATUTE AS APPLIED VIOLATES FUNDAMENTAL DUE PROCESS REQUIREMENTS OF PRIOR RESTRAINT AND CENSORSHIP LAW.

The criminal statute upon which the plaintiff's sole cause of action was based makes no mention of any civil remedies and certainly did not put the Florida Star on notice that it could be sued. The statute offers no procedure to test or balance the restraint it imposes.

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the United States Supreme Court stated that a "system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 420 U.S. at 559. Such procedural safeguards traditionally include prior notice and a meaningful opportunity to be heard in an adversarial proceeding attended by counsel before any rights under the First Amendment may be compromised.

On various occasions the Supreme Court has held that this rule applies to any restraint on expression, including Nazis parading in uniform through the streets of Skokie, Illinois, and the showing of allegedly obscene films and plays. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (denial of Nazi group's request

for parade permit; restraints on right to free speech permissible only if strict procedural safeguards provided); *Southeastern Promotions* (municipal board's denial of use of public theater for production based on board member's determination that musical was obscene constituted prior restraint requiring strict procedural safeguards before imposition); *Freedman v. Maryland*, 380 U.S. 51 (1964) (state statute required submission of films to board for approval; only judicial determination in adversary proceeding ensures necessary sensitivity to freedom of expression).

This due process concept was the centerpiece of the Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Court noted that truthful reports of the activities of the courts are at the core of constitutionally protected speech. The Court added, "regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press*, 427 U.S. at 560-61, *citing Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). The Court fashioned a traditional First Amendment three-part balancing test for evaluating the government's interests in a presumptively invalid gag order in a particular case.[29] In *Nebraska Press*, the Supreme Court emphasized that even though at the time it issued its restraint order the trial court did not know whether it could validly close its hearing,

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[29] To test the restraint, the Court looked to (a) the nature and extent of publicity; (b) less restrictive alternatives to prior restraint; and, (c) how effectively a restraint would operate. *Nebraska Press*, 427 U.S. at 562.

once a public hearing had been held those proceedings could not be subject to prior restraint. The same rationale is directly applicable to this case. Once Florida Star received the plaintiff's identity from the law enforcement agency's record of the incident, the newspaper was free to publish the now-public information, even though normally it would voluntarily refrain. Self-imposed restraints are one thing, but "[d]elays imposed by governmental authority are a different matter." *Nebraska Press*, 427 U.S. at 560.

The Court has emphasized that the same analysis must be employed when a legislature seeks to prohibit access to judicial proceedings. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court struck down a statute mandating closure of trials of sex offenders during the testimony of victims under the age of eighteen. Although the state's interest was to protect minor victims from embarrassment and to encourage them to come forward and testify, the Court held that these interests do not justify a blanket closure rule. "Where . . . the State attempts to deny rights of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest." *Id.* at 606-07.[30]

D. THE PURPOSES SERVED BY § 794.03 ARE INSUFFICIENT TO JUSTIFY SANCTIONS AGAINST TRUTHFUL PUBLICATION.

Ultimately, blanket statutory prohibition on publication of certain kinds of information, such as § 794.03, vest in the legislative and not the judicial branch the right to determine which speech is constitutionally permissible, a clearly impermissible shift of constitutional powers. As sympathetic as this Court was to the statute's purposes in

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[30] *See also* In re Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), *modified and aff'd on reh'g*, 820 F.2d 1354 (1987), *cert. dismissed*, ___ U.S. ___, 108 S.Ct. 1502 (1988) (order prohibiting publication of information obtained from FBI surveillance logs invalid where issued prior to full hearing through counsel).

Globe Newspaper, nevertheless, those purposes did "not justify a *mandatory* closure rule." 457 U.S. at 607-08 (emphasis in original).

This Court begins with the principle that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Rather a court must " . . . make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 843.

While the legislative history of § 794.03 is barren, a fair extrapolation based on the terms of the statute and judicial discussion of similar statutes leads to three conclusions. First, the statute is ineffective in achieving its ends. Second, it is not narrowly tailored to these ends. Finally, the apparent purposes of § 794.03 are insufficient to justify the substantial First Amendment impositions occasioned by this statute. Legislation which is facially at odds with the First Amendment cannot be examined in a vacuum, divorced from the context of its history.[31] Obviously, the lack of a legislative history renders the balancing of competing interests more difficult, but not impossible.

There are simply no published cases in the annals of Florida jurisprudence recording a criminal prosecution under this statute. Likewise, the implied strict liability

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[31] See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978). For example, the Sedition Act of 1798, though never formally overturned by judicial review, is nonetheless viewed and adjudged unconstitutional by the "court of history." New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964). *See also Globe Newspaper*, 457 U.S. at 605, *quoting* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (" 'the Constitution carries the gloss of history' ").

civil cause of action at issue here was first recognized in this litigation.

Ascribing historically documented legislative purpose to § 794.03 is impossible. Extrapolating one is speculative at best, as the Florida legislature did not create a substantive legislative history upon the statute's enactment or revision. The substance of the statute dates back to 1911, presumably representing the social views and legislative policies of that era.[32]

Case law is equally unrevealing. Prior to the determination of the First District Court of Appeal in this case that "the information published, the rape victim's name, was of a private nature and not to be published as a matter of law," *The Florida Star*, 499 So.2d at 884, the statute was mentioned only twice previously in recorded case law.

In *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2d DCA 1983), another of Florida's intermediate appellate courts considered a similar suit brought under § 794.03 for damages for violation of the statute, damages for intentional invasion of privacy, and

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[32] As originally enacted in 1911, § 794.03 prohibited the publication of the name of any "female" victim of rape, assault with intent to commit rape, or even the name of any female upon whom rape "may be committed," an absurd category encompassing all females. 1911 Fla. Laws ch. 6226, § 1. The statutory language was not substantially changed until 1974, one year before *Cox Broadcasting* was decided. The legislature extended the statute to the communication medium of broadcasting, and extended the prohibition to publication in "any instrument of mass communication." § 794.03, *Fla. Stat.* (Supp. 1974). In addition, the statute added the lengthier prohibition of publication of "the name, address, or other identifying fact or information, of the victim." *Id.* Language pertaining to a potential victim was deleted. Finally, the statute was no longer restricted to the raped female, but to any victim of any sexual offense defined within the chapter.

damages for intentional infliction of emotional distress. In that case, prosecutors had assured the victim of a rape that her name and photograph would not be published or displayed but took no steps to limit television camera access to the trial, and a video tape of the victim's testimony was broadcast that night in the evening news program of a local television station. Relying on *Cox Broadcasting*, the Florida Second District Court of Appeal ruled that § 794.03 "is inapplicable to the facts of this case." *Id.* at 330.

Thereafter, in an opinion written by one of the judges of the *Florida Star* panel, the Florida First District Court of Appeal affirmed summary judgment for defendants of a suit alleging violation of § 794.03, negligence, invasion of privacy, loss of consortium and publication " 'in reckless disregard for the physical safety of a rape victim.'." *Williams v. New York Times, Inc.*, 462 So.2d 38, 40 (Fla. 1st DCA 1984). In that case, "[n]o effort was made by the court, the prosecutor, or Mrs. Williams to keep her name, as victim of the crime, confidential." *Id.* at 39. The newspaper defendant published a story about the criminal trial and conviction of her assailant, and named her in the story.[33]

The only other substantive mention of § 794.03 can be found in two non-binding Florida Attorney General opinions, 1975 Op. Att'y Gen. Fla. 75-203 (July 14, 1975), and 1984 Op. Att'y Gen. Fla. 84-81 (August 21, 1984).[34] The 1975 opinion recognizes that the custodian of records has a duty not to disclose information within the scope of

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[33] Evidently, the parties essentially abandoned their statutory claim on appeal, seeking primarily to fashion a new tort for "reckless disregard for the physical safety of a rape victim." *Williams*, 462 So.2d at 40.

[34] Attorney General Opinions are not binding authority on the courts. Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla. 1986); Beverly v. Division of Beverages of the Department of Business Regulations, 282 So.2d 657 (Fla. 1st DCA 1973).

§ 794.03.[35] The 1984 opinion clearly follows *Cox Broadcasting* by advising the clerk of court that information which reveals the identity of a victim of sexual battery contained in public records made part of a court file and not specifically closed by order of the court are subject to disclosure. *See* § 119.07(4), *Fla. Stat.* (1987).

Section 794.03 probably implements legislative policies similar to those discerned in *Globe Newspaper*. Those policies might include the understandable desire to avoid embarrassment of the victim and to encourage victims to report sexual assaults (although the defendant eventually would have the right to confront his accuser). In *Globe Newspaper*, the Court evaluated a legislative purpose presumably like that underlying § 794.03, although in a different context. The Court found unconstitutional a statute which mandated automatic exclusion of the public from the courtroom during testimony of a minor victim of an alleged crime.[36] While the Court found a substantial state interest in protecting the minor victims of sex crimes from futher trauma and embarrassment, the Court found that this rationale would not justify a mandatory rule of closure of public trials. The Court dismissed as "speculative in empirical terms" and "open to serious question as a matter of logic and common sense," 457 U.S. at 609-10, the argument that courtroom closure encourages minor victims of sex crimes to come forward and testify in a truthful and credible manner. Like the Florida statute which imposes a mandatory prohibition

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[35] The opinion limits *Cox Broadcasting* to public court records. However, the Attorney General did not have the benefit of this Court's holdings in *Landmark Communications* and *Daily Mail* when considering the statute.

[36] Note that § 794.03 does not restrict its application to minors. Given the legal system's heightened concern for juveniles, *see Globe Newspaper*, 457 U.S. at 612-615 (Burger, C.J., and Rehnquist, J., dissenting), the state's interests against disclosure in the *Globe Newspaper* case were arguably more compelling than those here.

on the publication of a rape victim's name, the latter rationale proves too much. "Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify." *Id.* at 610. To allow a legislative prior restraint broadly prohibiting publication of categories of information on this rationale would admit no limiting principles and would justify legislative prior restraint of all manner of stories about all aspects of the criminal justice system.

A fair reading of § 794.03 suggests a much broader scope of application than that of the Massachusetts statute examined in *Globe Newspaper.* In requiring that "no person" may "cause or allow" the name of a sexual offense victim to be "printed, published or broadcast," liability quite arguably may extend to state prosecutors, state judges, civil litigants and their counsel.

In fact in this case the statute arguably applies to the plaintiff herself, her civil counsel, the state, trial court and clerk, appellate Judge Zehmer in the *Williams* case (but not this one),[37] and undersigned counsel. This case was filed using B.J.F.'s full name, as were all subsequent papers filed by her attorney in the trial court and in the initial appeal. It was not until the First District Court of Appeal, *sua sponte,* changed the style of this case that initials were substituted for the plaintiff's proper name. In related cases, Florida courts have noted disapprovingly the failure of the state criminal justice system to avoid disclosure.[38]

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[37] Other appellate decisions in Florida have identified the name of the rape victim. *See* Jennings v. State, 512 So.2d 169 (Fla. 1987); Bundy v. State, 455 So.2d 330 (Fla. 1984). If West Publishing Co. were considered to be mass media, they might be charged with a misdemeanor for publishing names of sexual battery victims.

[38] *See Williams,* 462 So.2d at 39 ([N]o effort was made by the court, the prosecutor or Mrs. Williams to keep her name, as

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Presumably, in filing a lawsuit on behalf of B.J.F. by name, her counsel had her express or implied consent to do so. Likewise, her counsel and the Florida Circuit Court would be expected to defend any charges under § 794.03 by pointing out that disclosure had already occurred by the time they added to it. It is even conceivable that B.J.F. wished to identify herself by name to reveal her plight as a victim of crime or to ventilate her grievances against the Florida Star,[39] nor does it account for the circumstance where identifying information has already been made part of the news.[40] *See Smith v. Daily Mail Publishing Co.,* 433 U.S. 97, 99-100 (1979). Nonetheless, the statute is fatally flawed in failing to recognize these obvious exceptions to its scope. *See Globe Newspaper,* 457 U.S. at 608-09.[41]

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the victim of the crime, confidential); Doe v. Sarasota-Bradenton Florida Television Co., Inc., 436 So.2d 328, 331 (Fla. 2d DCA 1983) ("[D]espite our understanding of these difficulties, or perhaps because of it, we cannot resist the opportunity to chastise the state somewhat for not having sought a protective order regarding cameras in the courtroom or other proper steps to support its alleged assurance to appellant that her name and photograph would not be used or published").

[39] Counsel is compelled to refer to B.J.F. by name in the List of Parties, *infra,* Rule 34.1(b) and to include her own pleadings in the appendix. Rule 30.1.

[40] § 794.03 does not distinguish between conviction and acquittal of an alleged perpetrator, nor does it take account for a wrongful accusation by an alleged victim of a sex crime. The Scottsboro Boys cases of the 1930's are a prime example of the latter. *See* Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

[41] One further effect of this statutorily implied strict liability cause of action is that it forecloses the common law defenses of newsworthiness or publication in the public interest, which are well recognized defenses to a common law claim

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Section 794.03 is also ineffective. Paradoxically, in a more modern statute, Florida addresses the sensitivities of a minor sexual offense victim by providing that courtrooms may be cleared during their testimony but specifically excludes members of the media from this restriction. § 918.16, *Fla. Stat.* (1987). It is difficult to reconcile this statute with § 794.03, because reading § 918.16 together with *Cox Broadcasting*, it is clear that at least in the case of sex crimes against juveniles, publication of the victim's name would be privileged where the perpetrator is brought to justice. Appellant suggests that its self-imposed policy, which is recognized generally (Tr. 47-48), explains the legislature's lenience reflected in § 918.16.

Finally, as written, § 794.03 disproportionately burdens the media. It singles out the media and their news sources for criminal jeopardy (and implied civil sanctions). It does not punish communication of the same information by others or communication which is not likely to cause or allow mass media coverage. Thus, while the statute is over-inclusive in purporting to prohibit all media and related communications without consideration of mitigating circumstances, it is underinclusive in failing to address other channels of communication. Thus, the statute runs afoul of this Court's prohibition against state laws which have selective discriminatory impact on mass

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for embarrassing private facts invasion of privacy. *See* Jacova v. Southern Radio & Television Co., 83 So.2d 34 (Fla. 1955); Cason v. Baskin, 155 Fla. 198, 206, 20 So.2d 243, 251 (Fla. 1945); Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla. 5th DCA 1982), *rev. denied*, 431 So.2d 988 (Fla.), *cert. denied*, 464 U.S. 893 (1983). *See also* Restatement (Second) of Torts § 652(D) (1977). This concern also rises to constitutional proportions. *See e.g.* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) ("here the speech concerns the legitimacy of the political process, and therefore clearly 'matters' ").

media. *Arkansas Writers' Project v. Ragland*, ___ U.S. ___, 107 S.Ct. 1722 (1987); *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *See also Daily Mail*, 433 U.S. 97 (discussion of discrimination among different forms of the mass media).

In *Daily Mail*, a state's interest "to protect the anonymity of the juvenile offender" to "further his rehabilitation" was found insufficient. The Court concluded that constitutional rights accorded by the First Amendment "must prevail over the state's interest in protecting juveniles." 443 U.S. at 104. As in *Daily Mail*, here we have state interests which are nonconstitutional in scope and which cannot outweigh the constitutional rights implicated in legislation prohibiting publication.

E. PUNITIVE DAMAGES ARE IMPERMISSIBLE ON THIS RECORD.

The plaintiff here asked for $18,000 and was awarded $25,000 in punitive damages for Florida Star's admittedly inadvertent, but accurate, publication of her name. In a libel context, this Court has likened the state interest in reputation to " 'our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.' " *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Thus, the Court reasoned, the State has an interest in allowing an individual monetary compensation for reputational harm through the mechanism of a defamation action.

However, that rationale is "wholly irrelevant" with regard to punitive damages, because such damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz*, 418 U.S. at 350. Under the rule of *Gertz* and its predecessor *New York*

Times Co. v. Sullivan, 376 U.S. 254 (1964), a media libel defendant may not be liable for punitive damages absent proof of the defendant's actual subjective awareness of probable error before publication. *See St. Amant v. Thompson*, 390 U.S. 727 (1968).

Assuming *arguendo* that the State's interest in the confidentiality of a rape victim's identity, as expressed in § 794.03 is analogous to its interest in reputation, this same proof requirement applies here and clearly was not met in this case. At most, publication of the plaintiff's name was inadvertent, and there is absolutely no proof in the record that any employee of the Florida Star was subjectively aware of the error before publication.

II

STRICT LIABILITY SANCTIONS FOR THE PUBLICATION OF TRUTHFUL INFORMATION LAWFULLY OBTAINED IMPOSE AN UNCONSTITUTIONAL CHILLING EFFECT UPON FIRST AMENDMENT FREEDOMS.

In its most recent examination of First Amendment principles limiting governmentally imposed tort sanctions against speech and press, the Court squarely rejected the imposition of strict liability, reasoning that "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubtedly 'chilling' effect on speech. . . ." *Hustler Magazine v. Falwell*, ___ U.S. ___, 108 S.Ct. 876, 880 (1988).

As strikingly similar as this case is to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 492, it is strikingly dissimilar in one major respect. In *Cox Broadcasting*, the Georgia Supreme Court initially had ruled that the trial court erred in construing that state's similar statute to extend to a civil cause of action for invasion of privacy. Rather, the Georgia Supreme Court had recognized "a common law tort exist[ing] in this jurisdiction without the help of the statute. . . ." 420 U.S. at 474, *quoting Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 62, 200 S.E.2d 127, 130 (1973).

On rehearing, the Georgia Supreme Court did construe the Georgia statute as an expression of "state policy that the name of a rape victim was not a matter of public concern" and that the statute was " 'legitimate limitation on the right of freedom of expression contained in the First Amendment.' " *Id.* at 475, *quoting* 231 Ga. at 68, 200 S.E.2d at 134. Most significantly, the Georgia Supreme Court had "explained, however, that liability did not follow as a matter of law and that summary judgment was improper. . . ." 420 U.S. at 475. By contrast, strict liability determined on directed verdict in favor of the plaintiff is now squarely before the Court.

This case proceeded solely on a statutorily-based strict liability theory. The trial judge directed a plaintiff's verdict on liability. Finding that the Florida Star's article fell within the ambit of § 794.03, the trial judge determined liability on the plaintiff's motion for directed verdict and instructed the jury "as a matter of law, that the defendant was negligent. The issue for your determination on the compensatory damage claim of the plaintiff is whether such negligence was a legal cause of loss, injury or damage sustained by plaintiff." (J.A. at 34). Thus the trial court submitted the compensatory damage case to the jury merely on the questions of proximate cause and damages. Presuming liability based upon the content of the publication, the derivative tort applied here precisely as Alabama's law of libel *per se* applied in *Sullivan*, 376 U.S. at 262. In that case the Court ruled that "such a presumption is inconsistent with the federal rule." *Id.* at 283-84.

Moreover, the trial court in essence presumed punitive damages as well. The court instructed, "If you find for the plaintiff, B.J.F., and find also that the defendant, the Florida Star, acted with reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against the defendant as punishment and as a deterrent to others." (J.A. 36). *Sullivan* requires a *de novo* review of the record to determine whether the proof (of actual malice) leading to punitive damages is made with "the convincing clarity which the Constitutional standard

demands." *Id.* at 285-86. *See also Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984).

In the closely related context of libel, this Court has rejected the rule of strict liability for false statements of fact:

> Our decisions recognize that a rule of strict liability that compels a publisher or a broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

Gertz v. Robert Welch, Inc., 418 U.S. 322, 340 (1974). This Court has characterized the *Sullivan* standard as one which rejects "the common law of strict liability for libel and slander." *Id.* at 342.

It is more than ironic – it is unconstitutional – that strict liability is rejected for false and defamatory speech but is invoked against true speech. Strict liability is rejected to provide a margin of error, breathing space to avoid media self-censorship of truthful speech.

It is useful to examine other measures of liability available in related false light invasion of privacy and libel causes of action. This examination demonstrates that no form of liability is appropriate for truthful speech, thus underscoring that no government sanction is appropriate for speaking and publishing the truth.

In the area of false light invasion of privacy, this Court has applied the libel-based standard of actual malice. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). The difficulty with this standard is that it focuses on falsity, an element not present in a strict liability for embarrassing private facts tort claim. In the latter, it is simply inapposite to examine speakers' or publishers' conduct to determine if they acted with knowledge of falsity or in reckless disregard of truth or falsity. In light of the rich heritage of protecting the truth-seeking process, it is constitutionally inappropriate to drop the falsity element of that standard to punish reckless or deliberate use of the truth.

Likewise, *Gertz* and its progeny refer to a negligent breach of care in verifying the accuracy of printed or spoken information. To eliminate the element of falsity (i.e. accuracy) from that standard leads to a similarly absurd construct – negligent communication of the truth.

The conclusion is inescapable. Measured against our constitutional heritage which carefully protects each step to the truth, rejects "a rule that would impose strict liability," *Falwell*, 108 S.Ct. at 880, and allows some false and defamatory speech to occur for the purpose of finding the truth, no standard squares with this constitutional heritage which would allow punishment of truthful speech or publication.

Acknowledging the power of government to regulate the content of the news invites its use and admits no limiting principle.

> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. of Education v. Barnett, 319 U.S. 624, 641 (1943).

CONCLUSION

Our democratic system of free expression values each step to truth, depends on a marketplace of ideas and information to shape the evolution of knowledge and beliefs, and abhors governmental interference through prior restraint. Measured against these principles, Florida may not sustain a statute that punishes truthful publication of lawfully obtained information about a matter of public concern. The lower court's determination that this information is not to be published as a matter of law is constitutionally infirm and due to be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

THE FLORIDA STAR,
Appellant,

VS.

B. J. F.,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

We are unable to accept the appellant's statement of the questions presented, for three reasons: the information published was not "lawfully obtained"; no "criminal sanctions" were imposed for its publication; and there was no imposition of "strict liability" upon the appellant below. We therefore restate the question presented on the merits as follows:

> WHETHER THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A STATE FROM EXTENDING A CIVIL CAUSE OF ACTION FOR DAMAGES FOR INVASION OF PRIVACY CAUSED BY A NEWSPAPER'S PUBLICATION OF THE NAME OF A RAPE VICTIM, WHERE THE NAME WAS OBTAINED FROM A POLICE REPORT EXPLICITLY MADE CONFIDENTIAL BY STATUTE, AND WAS PUBLISHED THEREAFTER WITH "RECKLESS INDIFFERENCE" TO THE VICTIM'S RIGHTS AND IN VIOLATION OF AN ADDITIONAL STATUTE MAKING ITS PUBLICATION A CRIME.

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No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE FLORIDA STAR,
Appellant,

vs.

B. J. F.,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the appellant's brief, the following statutory provisions are relevant here:

Section 119.011, Fla. Stat. (1983). Definitions.

For the purpose of this chapter:

(1) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound

recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.07, Fla. Stat. (1983). Inspection and Examination of Records; Exemptions.

> (1)(a) Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee . . . .
>
> . . .
>
> (3)(a) All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from the provisions of subsection (1).
>
> (h) Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of any sexual battery as defined by chapter 794 . . . is exempt from the provisions of subsection (1).

STATEMENT OF THE CASE

We are unable to accept the appellant-newspaper's Statement of the Case, because it is both misleading and incomplete. Indeed, it would appear to be purposefully designed to conceal several critical aspects of the case from the Court—aspects which clearly make it an altogether different case than the cases upon which the appellant ultimately bottoms its argument on the merits. It is therefore necessary to restate portions of the case briefly.[1]

As the Court is now aware, B. J. F. suffered the ultimate outrage and invasion of her personality when she was raped at knifepoint on October 20, 1983 (SR. 2; Tr. 26).[2] She thereafter reported the rape to the office of the Sheriff of Duval County, Florida, which duly prepared a "police report" of the incident (Tr. 27, 109-12). The police report was a "public record" only in the sense that it was a document prepared by a governmental agency in the course of its official business. Section 119.011(1), Fla. Stat. (1983). The report was not a "public record" in the sense that it was available for inspection by the public; indeed, §119.07(3)(h), Fla. Stat. (1983), expressly made

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1. Our Motion to Dismiss or Affirm sets forth additional procedural background, in support of our contention that the Court lacks appellate jurisdiction because the validity of the statute challenged here was neither drawn into question with the requisite specificity nor expressly passed on below. Since the Court has noted "probable jurisdiction", we will not reiterate that position or its background here. If the question is still open, we rely upon our Motion to Dismiss or Affirm.

2. J.A.: Joint appendix.

J.S.A.: Appendix to Jurisdictional Statement.

R.: Record on appeal.

SR.: Supplemental record on appeal.

Tr.: Separately paginated transcript of trial testimony contained in record on appeal.

the report confidential and exempted it from the public disclosure requirements of Florida's "Public Records Act".

Nevertheless, the Sheriff's office inadvertently allowed the newspaper access to the report, and it was copied verbatim by one of the newspaper's reporters (Tr. 109-12). As we shall explain in more detail *infra*, as a matter of state law, the newspaper was charged with notice of the statutory confidentiality of the report; it was prohibited from copying the confidential portions of it; and its conduct in copying the confidential portions of the report was not rendered "lawful" merely because the report had been inadvertently unprotected by the governmental agency charged with protecting its confidentiality.

Thereafter, B. J. F. suffered the ultimate invasion of her privacy when the newspaper published an account of the rape, identifying her by name as the victim (J.S.A. 14). The publication of her name violated an additional statute prohibiting mass media publication of a rape victim's name and providing criminal penalties for doing so —§794.03, Fla. Stat. (1983). Understandably upset at this double-violation of the unambiguous state laws intended to protect her constitutional, statutory, and common law right of privacy, B. J. F. filed suit against both the newspaper and the Sheriff (R. 2). Her amended complaint sought compensatory damages from both the newspaper and the Sheriff for violation of §794.03 and the consequent "invasion of her privacy" (J.S.A. 7). Count II of her amended complaint alleged that the newspaper's conduct in publishing her name was intentional, or recklessly indifferent, and sought an award of punitive damages against the newspaper (*Id.*).

The newspaper thereafter answered the amended complaint, generally denying liability, and asserting no constitutional defenses (R. 20). The joint pre-trial stipulation filed by the parties recognized that the plaintiff's cause of action did not sound in "strict liability", but required proof of negligence to support a recovery of compensatory damages, and proof of recklessness to support a recovery of punitive damages (J.A. 6). B. J. F. subsequently settled her action against the Sheriff (Tr. 82), and her action against the newspaper was thereafter tried to a jury (Tr. 1). At trial, the newspaper was allowed to file an amended answer, which asserted generally that the newspaper's conduct was protected by the United States Constitution (J.A. 5; Tr. 9).

At trial, the plaintiff, a nurse's assistant with four children, testified that she had reported the rape to the police, and that the newspaper's report of it was unfortunately accurate (Tr. 26-27, 36). She first learned of the newspaper article when a fellow worker brought it to her while she was in the hospital recovering from the assault (Tr. 27). She had heard about the article from others many times, and as recently as three weeks before trial (Tr. 27-28, 33). The plaintiff's testimony reflects that her phone number was listed in the telephone directory, together with her address (Tr. 28-29, 65-66; plaintiff's exhibit 2).

Shortly after her rape, while she was hospitalized and her mother was staying at her home to take care of the children, her mother received a telephone call from a man who stated that he would rape her again; the man called two or three times (Tr. 30, 42). The plaintiff testified that she was extremely upset by the publicity and the phone calls; that she had been forced

to request police protection; that she had been forced to change her telephone number; and that she had ultimately been forced to change her residence out of fear of the caller and the other publicity arising from the newspaper's publication of her name (Tr. 29-32, 37). The plaintiff also required mental health counseling for her emotional distress at the unwanted publicity (Tr. 32, 38).

The newspaper's side of the story was placed in evidence by three witnesses. The reporter trainee who obtained the information was Jacqueline Lotson (Tr. 50, 108). Her job was to copy police reports which were made available in the Sheriff's "press room" (Tr. 108-09). She acknowledged that the Sheriff had posted a sign in the press room stating that it was against the law to publish the name of the victim of a sexual battery (Tr. 113, 116). She also acknowledged that she was aware of her newspaper's policy against publishing the names of rape victims (Tr. 115).

Ms. Lotson also acknowledged that she knew she was not supposed to copy the name of a rape victim from a police report. Since the newspaper has conveniently ignored this damaging admission, we quote it in full so there can be no question here that the newspaper knew that the identity of B. J. F. was supposed to have been confidential:

> Q. Did you get any understanding that it meant that you weren't allowed to take down that information?
>
> A. Right.
>
> Q. Excuse me?
>
> A. I mean, yes, I understood that.

> Q. You understood you were not supposed to take down the information from the police department?
>
> A. Yes.

(Tr. 117).[3] Notwithstanding this knowledge, Ms. Lotson made a verbatim copy of the police report, and provided it to a staff writer at the newspaper (Tr. 109-12).

The staff writer who drafted the story from the reporter's copy of the police report testified that both the ethics of her profession and the policy of the newspaper prohibited the publication of a rape victim's name; that she was aware of this at the time she wrote the story; that, although she did intend that the story she wrote be printed, she did not intend that B. J. F.'s name be printed; and that she had made an error in putting her name in the story (Tr. 88-89, 100-01). Her explanation was that she viewed the crime merely as a robbery (Tr. 100). Since the article she wrote stated that the assailant "placed a knife to her neck . . . then undressed the lady and had sexual intercourse with her before fleeing the scene . . .", this explanation was clearly incredible on its face (or at least a jury would be hard pressed to find otherwise) (J.S.A. 14; Tr. 101).

The newspaper's owner, publisher, and managing editor testified that it was his newspaper's policy not to print the names of rape victims; that many newspapers have the same policy; and that all his employees had

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3. Ms. Lotson later attempted to recant this admission (Tr. 118-20). However, it is settled under Florida law that, in such a circumstance, the recantation does not eliminate the admission; instead, the jury can credit the original testimony and disbelieve the recantation. *Burr v. State*, 466 So.2d 1051 (Fla.), *cert. denied*, 474 U.S. 879 (1985). *See Marks v. Delcastillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); *Wynne v. Adside*, 163 So.2d 760 (Fla. 1st DCA 1964).

been instructed upon the policy (Tr. 47-48, 51). He acknowledged that not only had Ms. Lotson and the staff writer violated that policy, but that a number of additional persons in the supervisory chain had missed the error and violated the policy—the article's editor, the typesetter, the proofreader and the news editor (Tr. 52-58). He had no explanation for the violation other than to concede that all six of these employees had made "a mistake", that the error had "[j]ust slipped by", and that his news editor had "neglected to check [the article] properly" (Tr. 57-58).

At the close of the plaintiff's case and at the close of all the evidence, the newspaper moved for a directed verdict, contending that it had lawfully acquired the plaintiff's name from a "public record", and that imposition of civil liability for its publication would be unconstitutional—because §794.03 was either "overbroad" or could not be applied to the facts in the case without violating the First Amendment (J.A. 9-33). The plaintiff responded that the newspaper's acquisition of the plaintiff's name was not "lawful", because §119.07 explicitly provided that the plaintiff's name was not a matter of "public record" (and amici's contention that this argument was asserted for the first time on appeal is therefore dead wrong) (J.A. 27-28). It was also pointed out to the trial court that Florida courts had limited §794.03 by construction to prevent its application to the publication of the names of rape victims whose identity, unlike the plaintiff's, were already in the public domain (J.A. 16). The trial court ruled, in essence, that (as construed) the statute was not "overbroad"; that the plaintiff's name was not a matter of "public record"; that the plaintiff's privacy rights outweighed the newspaper's First Amendment rights on the facts in the case; and that §794.03 was therefore not unconstitutional "as applied"—and the motions for directed verdict were denied (J.A. 18, 31-33).

Following denial of the newspaper's motions, the plaintiff moved for a directed verdict on liability for compensatory damages. Counsel contended that §794.03 established the minimum standard of care in the circumstances; that its violation was negligence *per se;* and that its violation had been admitted (J.A. 28-32). The trial court granted the motion, and ultimately instructed the jury that the newspaper had negligently invaded B. J. F.'s privacy as a matter of law (J.A. 32-33, 34).[4] The jury was also instructed that it could, in its discretion, award punitive damages if it also found that the newspaper "acted with reckless indifference to the rights of others" (J.A. 35-36).

Following closing argument—in which the newspaper's counsel conceded that the newspaper had violated its own rules and therefore erred, and that the trial court had justifiably found it negligent as a result (Tr. 160-61)—the jury returned a verdict awarding the plaintiff $75,000.00 in compensatory damages, and $25,000.00 in punitive damages (J.A. 38). Necessarily inherent in the punitive damage award, of course, is a finding that

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4. *See DeJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973) (holding that violation of a statute designed to protect a particular class of persons from a particular type of harm is negligence as a matter of law). Contrary to the newspaper's insistence here that the plaintiff's cause of action derived from the criminal statute and that it was held "strictly liable", the cause of action was treated throughout the proceeding as a common law action for negligent invasion of privacy, and the statute was utilized simply as a legal definition of the minimum standard of reasonable care required under the circumstances.

the newspaper had not merely made an "inadvertent mistake" (as the newspaper continues to insist here), but that it had been "recklessly indifferent" to the plaintiff's privacy rights. The verdict was reduced to judgment (R. 21), and an amended final judgment (reflecting a setoff for the plaintiff's settlement with the Sheriff) was ultimately entered against the newspaper in the amount of $97,500.00 (J.S.A. 5).[5]

On appeal to the District Court of Appeal of Florida, First District, the newspaper raised one, and *only* one, of the numerous contentions which it and its amici have now raised here. It posited in its initial brief that "[i]t is a violation of the 1st and 14th amendments to hold a newspaper civilly liable for the accurate publication of the name of a rape victim where that name is lawfully obtained from a police report" (appellant's initial brief, p. 4). The argument following this introductory heading was a challenge to the constitutionality of imposing civil liability upon the newspaper for the violation of §794.03 which occurred in this case. This, of course, was an argument that §794.03 was unconstitutional "as applied" to the facts in the case—and that contention should therefore be the only issue properly before this Court.[6]

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5. Although the newspaper's amici have asserted that the newspaper is uninsured and will be put out of business if forced to pay the judgment, the record contains no support whatsoever for either assertion—and both assertions are, in any event, entirely irrelevant to the issue before the Court.

6. A cursory "overbreadth" challenge was raised for the first time in the newspaper's reply brief (appellant's reply brief (amended), pp. 14-15). However, Florida courts rigorously enforce their settled rule that contentions made for the first time in a reply brief cannot and will not be considered—so the Court

(Continued on following page)

The lower court disagreed with the single contention made to it, and held that the statute was not unconstitutional "as applied", explaining as follows:

> Reaching the merits, we find that the information published, the rape victim's name, was of a private nature and not to be published as a matter of law. *See Doe v. Sarasota-Bradenton Florida Television Company, Inc.*, 436 So.2d 328, 330 (Fla. 2d DCA 1983), particularly the reference to Opinion 075-203 of the Attorney General of Florida (July 14, 1975), which suggests that Section 794.03, Florida Statutes, be applied to the prosecution of parties publishing non-public information. Accordingly, we affirm.

The Florida Star v. B. J. F., 499 So.2d 883, 884 (Fla. 1st DCA 1986), *review denied*, 509 So.2d 1117 (Fla. 1987) (footnote omitted).

SUMMARY OF ARGUMENT

This case presents a stark clash between two cherished constitutional rights, the right of privacy and freedom of the press—on facts which lie at the very core of the former and at the furthest margin of the latter. There is a single state law issue to be confronted at the outset. The newspaper insists that the plaintiff's name was "lawfully obtained" from "public records". We

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Footnote continued—

must assume that the overbreadth challenge was waived below. *See, e. g., Shee-Con, Inc. v. Al Seim Appraisal Service, Inc.*, 427 So.2d 311 (Fla. 5th DCA 1983); *Zerwal v. State Farm Mutual Automobile Insurance Co.*, 332 So.2d 645 (Fla. 3rd DCA 1976); *Pursell v. Sumter Electric Co-Operative, Inc.*, 169 So.2d 515 (Fla. 2nd DCA 1964); *St. Regis Paper Co. v. R. D. Hill*, 198 So.2d 365 (Fla. 1st DCA 1967).

disagree. According to an exemption contained in Florida's Public Records Act, B. J. F.'s name was confidential. That exemption bound the newspaper every bit as much as it bound the custodian of the record, and the newspaper's action in copying B. J. F.'s name was not rendered "lawful" merely because the sheriff's office failed in its obligations under the Act. That, we submit, is a question of state law which has been definitively resolved in this case by the lower court, and which is therefore not open to debate here.

Once it is understood that the plaintiff's name was not "lawfully obtained" from a "public record", *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), is readily distinguished. In fact, an examination of *Cox* will reveal that the issue presented here was expressly left "open" in it. There are also several additional aspects of *Cox* which make it a considerably different case than the one presented here. In *Cox*, the rape victim was dead; her assailant had been apprehended, indicted, and tried; and the privacy right being asserted was that of the victim's father, not the victim. *Cox* therefore clearly does not "control" the compellingly different set of facts in this case.

Several of the remaining decisions relied upon by the newspaper simply follow *Cox* on similar facts, so they add little to the debate. The rest of them simply balance First Amendment interests against various competing interests and come down on the side of the First Amendment. However, there are other decisions from this Court which balance First Amendment interests against competing interests and come down on the side of the competing interests—so the most that the newspaper's argument demonstrates is that a "balancing test"

is the appropriate jurisprudential mechanism for resolution of the competing interests at stake here. In our judgment, that "balancing test" will admit of only one defensible conclusion here—that the plaintiff's interests and the State's interests far outweigh the newspaper's right to "print the news".

The plaintiff's rights are clearly substantial. After *Cox* was decided, this Court announced that the United States Constitution contains a constitutional right of privacy which protects "the individual interest in avoiding disclosure of personal matters". *Whalen v. Roe*, 429 U.S. 589, 599 (1977). In addition, the plaintiff has both a common law and a state constitutional right of privacy —both of which are fully protected by the statutory scheme which the newspaper has challenged here. And if those three rights of privacy do not protect a rape victim from mass media publication of her name, within days of the crime and while her assailant is still at large, then they protect nothing at all. Clearly, the plaintiff's interest in the non-disclosure of her name by the mass media in those circumstances lies at the very core of the right of privacy.

There are practical matters to be weighed in the balance as well. Publication of a rape victim's name may subject the victim to harassment by the rapist or others, as it did in this case, requiring the victim to change her phone number and residence, as it also did in this case. In egregious cases, a complete change of identity might be required. Publication of a rape victim's name also enables the assailant to locate and murder the only person who is capable of identifying him and furthering his apprehension, which is why the plain-

tiff required police protection in this case—and which is reason enough, by itself, for the statutory scheme in issue here. The State also has a strong interest in assisting and encouraging rape victims to report their rapes, and guarantees of anonymity are essential to that end. An announcement by this Court that there is a constitutional right to identify a rape victim by name in the mass media, whenever a less than efficient clerk at a police station has failed to protect her name from the media, is likely to keep rape victims away from the police department in droves. In short, the several interests to be placed on the plaintiff's side of the scale in this case are both clearly substantial and highly compelling.

To be balanced against these substantial interests is the newspaper's right to print the news. In our judgment, that right is wholly insubstantial on the facts in this case. While the fact of the plaintiff's rape may have been a matter of "legitimate public concern", her name was of no concern to the public at all. Indeed, since she was still alive and her assailant was still at large, the only *legitimate* concern which the public could have is for her continued anonymity. The newspaper itself conceded as much below when it conceded that the journalists' code of ethics, its own policy, and the policies of most members of the media prohibit publication of a rape victim's name. Surely, if the media itself has determined that the public interest in learning the identity of a rape victim is insufficient to outweigh the substantial competing interests at stake here, this Court should have little difficulty in following the lead of the Supreme Court of Canada, which recently reached essentially that conclusion in a similar case.

That will be the central thrust of our argument. When we have concluded it, we will briefly address several of the newspaper's miscellaneous contentions. We will demonstrate that there is no support in the Constitution for the notion that the truth can be published with impunity merely because it is the truth, and that a "balancing test" is required instead. We will also address three contentions which are not properly before the Court, and which are without merit in any event —the newspaper's "overbreadth" challenge; its contention that it was impermissibly found "strictly liable"; and its contention that its conduct did not justify the imposition of punitive damages. We will urge in concluson that the plaintiff's judgment should be affirmed.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS DO NOT PROHIBIT A STATE FROM EXTENDING A CIVIL CAUSE OF ACTION FOR DAMAGES FOR INVASION OF PRIVACY CAUSED BY A NEWSPAPER'S PUBLICATION OF THE NAME OF A RAPE VICTIM, WHERE THE NAME WAS OBTAINED FROM A POLICE REPORT EXPLICITLY MADE CONFIDENTIAL BY STATUTE, AND WAS PUBLISHED THEREAFTER WITH "RECKLESS INDIFFERENCE" TO THE VICTIM'S RIGHTS AND IN VIOLATION OF AN ADDITIONAL STATUTE MAKING ITS PUBLICATION A CRIME.

On the merits, the issue presented here is really a rather narrow one. The issue, properly framed on the facts most favorable to the verdict, is whether the First Amendment immunizes the press from civil actions for

invasion of privacy involving mass media publicaton of a clearly private matter about a clearly private individual —the identification of a rape victim by name, within days of the crime and before apprehension of the assailant—where the information was obtained in violation of a statute requiring that its confidentiality be maintained and was published in violation of a statute prohibiting its publication.

In short, this case presents a stark clash between two cherished constitutional rights, the right of privacy and freedom of the press—on facts which lie at the very core of the former and at the furthest margin of the latter. As we shall demonstrate, the proper jurisprudential mechanism for resolving this conflict is to balance each right against the other—and, when that task has been performed, we think the Court will readily conclude that the plaintiff's privacy rights far outweigh the newspaper's right to "print the news", and that the First Amendment therefore contains no license for the clearly tortious conduct of the newspaper on the facts in this case.

For the most part, the newspaper has assiduously avoided both the singularly narrow issue presented here and the balancing mechanism by which it must certainly be resolved, and has argued its case as if the future of the government and our democratic "marketplace of ideas" were somehow at stake. In our judgment, this grandiose inflation of the issue has resulted in an argument which largely misses the point. The newspaper has also advanced a potpourri of miscellaneous contentions —many of which seem to us to be beside the point, and most of which were not advanced in the lower cou. We will therefore divide our responsive argument into

two parts. First, we will refocus the Court upon the narrow issue presented here, explore the balancing mechanism by which it must be resolved, and demonstrate that the balance was properly struck in the lower courts. The second section of our argument will briefly address the miscellany of contentions which have no real bearing on the issue before the Court.

A. On the particular facts in this case, the lower courts properly balanced the conflicting interests of the parties in favor of the plaintiff's right of privacy.

1. The plaintiff's name was not "lawfully obtained".

Before we turn to analysis of the constitutional issue, we think it is important to alert the Court to a central flaw in the legal argument presented by the newspaper here—its repeated insistence that B. J. F.'s name was a matter of "public record" and therefore "lawfully obtained" by the newspaper. In our judgment, the newspaper has simply rewritten the facts in an effort to make them fit within the decisional law upon which it relies, in the hope that it can thereby avoid a balancing of the competing interests at stake here. This aspect of the argument therefore needs to be straightened out at the outset.

The fact of the matter is that the plaintiff's identity as a rape victim, although contained on a document prepared by a governmental agency in the course of its official business, was not a matter of "public record" in the sense that it was available for inspection by the public. The Florida Public Records Act—specifically

§119.07(3)(h), Fla. Stat. (1983)—expressly provided that the plaintiff's name was exempt from public disclosure, i. e., that it was to be kept confidential. Ms. Lotson admitted at trial that she knew that, but she copied the name anyway. The newspaper advanced a number of inventive arguments below to avoid the statutory confidentiality of the plaintiff's purloined name—arguing that the name, although confidential, was nevertheless a "public record", and arguing that only the sheriff had a duty to obey and assert the exemption and that the newspaper could freely ignore the statute if the sheriff ignored it—but those arguments amounted to little more than semantics.

Stripped of its semantics, the newspaper's argument amounted to no more than this—the press is not bound to respect valid state statutes protecting the confidentiality of information if the state itself fails to prevent a violation of the confidentiality provisions of the statute. Reduced to its further essentials, the argument says, in effect, that the press need not obey confidentiality laws if the state fails to rigorously enforce them (and if the state fails to censor and guard its own records, the press may thereafter violate a statutory prohibition against publication with impunity). The argument clearly overlooks the plaintiff's rights in the matter (which both statutes were clearly designed to protect), of course, and it renders the confidentiality aspect of the Florida Public Records Act violable at will, and completely meaningless as a result. If the newspaper is correct, then the press has a license to steal and publish statutorily protected material with impunity, and the state and its citizenry are helpless to do anything about it in any manner at all. The newspaper is not correct, however.

In a case nearly indistinguishable from this one on the legal issue presently under discussion, the District Court of Appeal of Florida, Second District, held that the right to inspect public records "does not apply to all public records since public policy requires that some of them, although of a public nature, be kept secret and free from public inspection"; that a state employee's inadvertent failure to comply with a statute requiring certain information to be kept confidential did not authorize a newspaper to take and print the information; and that the newspaper's retrieval of the information in that fashion was not "lawful" merely because it was inadvertently unprotected by the state employee, since it was protected by a higher authority in the form of a state statute. *Patterson v. Tribune Co.*, 146 So.2d 623, 626 (Fla. 2nd DCA 1962), *cert. denied*, 153 So.2d 306 (Fla. 1963).

The court concluded:

> . . . The accredited news dispensing agencies of Florida are charged with knowledge of the statute. The fact that information which is not in the public domain has been obtained innocently does not license a publisher, charged with knowledge of the proscribed character of the information, to publish it further and thus compound the wrong.

Id. at 627. *Accord, Cape Publications, Inc. v. Hitchner*, 514 So.2d 1136 (Fla. 5th DCA 1987), *review granted*, 13 FLW 65 (Fla. April 14, 1988). Of course, the lower court in the instant case necessarily reached the identical conclusion.

Neither *Patterson*, *Hitchner*, nor the lower court's decision definitively answers the federal *constitutional*

question raised by the newspaper here, but they certainly dispose of the newspaper's contention that it could safely ignore its own knowledge of §119.07(3)(h)—actual, imputed, or otherwise—and "lawfully obtain" the plaintiff's name merely because a sheriff's employee may not have acted to enforce the law. After all, shoplifting is not rendered "lawful" merely because a merchant has openly displayed his wares. Clearly, basic common sense requires a conclusion that the newspaper had the same obligation to observe state law that the sheriff had, else the confidentiality provisions of the Public Records Act are largely meaningless—and we submit that that is a question of state law which has been definitively resolved in this case. *See Hicks v. Feiock*, 485 U.S. ....., 108 S. Ct. 1423, 99 L. Ed.2d 721 (1988) (where state supreme court has denied review of intermediate state court's resolution of issue of state law, this Court is not at liberty to resolve it differently).

Nothing in the First Amendment requires a contrary conclusion: "The right to speak and publish does not carry with it the unrestrained right to gather information". *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). The press simply has no right of access to information held by the government which is superior to that of the public itself. *See Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). If state confidentiality laws are to have any meaning at all, they must apply to everyone—including the press—and the newspaper's retrieval of the plaintiff's name in this case, because it clearly violated state confidentiality laws, must be deemed, at minimum and as a matter of settled state law, "unlawful".

2. Cox Broadcasting Corp. v. Cohn is not "controlling" on the issue presented here.

Once it is understood that the plaintiff's identity as a rape victim was made confidential by law and that the newspaper's acquisition of it was in violation of that law and therefore "unlawful", the decision relied upon by the newspaper as "controlling" here is readily distinguished. In fact, a brief analysis of the decision will reveal that the issue presented here was expressly left "open" by it. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the defendant-television station obtained the identity of a rape victim in judicial proceedings "open to public inspection". The defendant urged this Court to hold that the First Amendment protected the publication of all truthful information, however obtained—which is essentially the position urged upon this Court by the newspaper here. This Court declined that request, however, noting that there are "impressive credentials for a right of privacy" (420 U.S. at 489)—and it carefully narrowed the issue as follows:

> Those precedents, as well as other considerations, counsel similar caution here. In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the state may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that

> this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records —more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

420 U.S. at 491.

The Court thereafter narrowly limited its holding, concluding that the First Amendment protects the press from liability for invasion of privacy resulting from publication of information obtained from records "open to public inspection", but it expressly left open the quite different question presented in the instant case—whether the First Amendment protects the press from liability for invasion of privacy resulting from statutorily-proscribed publication of private information obtained from statutorily-protected confidential records which are, by law, *not* "open to public inspection":

> . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others

> reliance must rest upon the judgment of those who decide what to publish or broadcast. [Citation omitted].

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.

> 26. We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

420 U.S. at 496-97. In the instant case, of course, the "political institutions [of Florida] weigh[ed] the interests of the public to know and of the press to publish", and *did* "respond" with a statute designed to prevent the exposure of (and public trafficking in) rape victims' names—and the evidence reflects without dispute that the plaintiff's name was obtained by the newspaper in violation of the statute. Because the issue presented here was expressly left open in *Cox*, *Cox* clearly is not "controlling" here.

There are additional aspects of *Cox* which make it a very different case than the one presently before the Court, and which the newspaper cannot so cavalierly ignore. In *Cox,* the rape victim was dead; her alleged assailant had been apprehended, indicted, and tried; and the privacy right being asserted was that of the victim's *father,* not the victim herself. In the instant case, B. J. F. survived the assault; the newspaper publicly advertised her identity almost immediately after the assault, at a time when her assailant was still at large (and therefore able to assault her again, or to murder her to prevent his identification and subsequent apprehension); and, of course, the privacy right asserted was that of the victim herself. These considerable differences between the two cases also renders *Cox* far from "controlling" here, and they will figure prominently in our argument when we ultimately turn to the task of balancing the competing interests which are at stake.[7]

3. The appropriate jurisprudential mechanism for resolution of this case is a balancing of the competing interests.

A number of the additional decisions relied upon by the newspaper simply follow *Cox* on similar facts, and they are therefore inapposite here for the same reason that *Cox* is not controlling. *E. g., Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977) (name of juvenile learned at court proceedings open to the public;

7. Our subsequent balancing of the competing interests will also provide good reasons for overruling *Cox* if it is found to be "controlling" here. Because the two cases are so different, we doubt that that will become necessary. In an abundance of caution, however, if *Cox* is determined to be "controlling", we respectfully submit that it should be overruled for the reasons which follow.

no evidence that name acquired unlawfully or without State's approval); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979) (name of juvenile "lawfully" obtained by merely asking various witnesses; question of "unlawful press access to confidential" information expressly left open). *See Doe v. Sarasota-Bradenton Television Co., Inc.,* 436 So.2d 328 (Fla. 2nd DCA 1983) (name of rape victim learned in open court); *Williams v. New York Times, Inc.,* 462 So.2d 38 (Fla. 1st DCA 1984) (same); *Ayers v. Lee Enterprises, Inc.,* 277 Or. 527, 561 P.2d 998, 86 A.L.R.3d 72 (1977) (name of rape victim learned from police, where no statute provided for confidentiality of information; court intimating that different result might be required by post-incident enactment of statute preserving confidentiality of rape victims' names).

An additional decision relied upon by the newspaper is somewhat closer to the point, because it addresses the publication of information declared "confidential" by state law. In *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978), this Court was confronted with the following question:

> The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.

435 U.S. at 830. In answering the question, the Court did not conclude that the First Amendment protected all truthful publications, however obtained; instead, it re-

sorted to a "balancing test", weighing the state's interest in confidentiality against the interests embodied in the First Amendment. It concluded that, because the qualifications of the judiciary were central concerns of a self-governing public, publication of information concerning judicial qualifications "lies near the core of the First Amendment"—435 U.S. at 838—and it held that First Amendment interests outweighed Virginia's interests in confidentiality on those facts.

A similar type of balancing was also obviously at work (in aggravated form, because of the higher scrutiny afforded "prior restraints") in the Court's otherwise cryptic decision in the "Pentagon Papers Case", *New York Times Co. v. United States*, 403 U.S. 713 (1971). It is difficult to imagine anything closer to "the core of the First Amendment" than publication of the defense department's history of its decision-making in a war costing billions of taxpayers' dollars and thousands upon thousands of American lives. A similar type of balancing was also at work in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982), in which the Court balanced the First Amendment's "constitutional right of access to criminal trials" against the competing interests of a minor rape victim, and struck down a statute requiring *mandatory* closure of her assailant's trial in favor of enforcement of the statute on a case by case basis.

Neither do any of the numerous defamation cases relied upon by the newspaper contribute much toward resolution of the issue presented here. In each of them, the Court balanced First Amendment interests against the states' interests in protecting reputation, and compromised them both (and in different degrees, depending on the

status of the plaintiff). *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). *See generally* Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: an Analytical Primer*, 61 Va. L. Rev. 1349 (1975). And because only a post-publication remedy for damages is in issue here, rather than a prepublication remedy to enjoin publication, the newspaper's insistence that the plaintiff's judgment for damages amounts to an impermissible "prior restraint" is well wide of the relevant field of inquiry here. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). *See generally* Tribe, *American Constitutional Law*, §§12-34 through 12-35 (2nd Ed. 1988).

The cases collected by the newspaper are also not the only cases which speak to the issue presented here. There are other cases in which this Court has balanced First Amendment interests against competing interests, and has found in favor of the *competing interests*—at the expense of the First Amendment. *See, e. g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (circus performer's "right of publicity" outweighs press's First Amendment rights, justifying civil action for damages to redress unauthorized televising of performer's entire 15-second act); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (criminal defendant's Sixth Amendment rights outweigh press's First Amendment rights, justifying closure of pre-trial suppression hearing); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (state's interest in protecting reputations of citizens outweighs First Amendment interests where speech does not involve matter of public concern); *Hazelwood School District v. Kuhlmeier*, 484 U.S. ....., 108 S. Ct. 562, 98 L. Ed.

2d 592 (1988) (educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored newspaper where their actions are reasonably related to legitimate pedagogical concerns).

This Court's most recent foray into the conflict represented by the competing interests at stake here—privacy and press—is particularly instructive. In *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), which arose out of a defamation and invasion of privacy action by Rhinehart (and others) against the Seattle Times, the newspaper sought pre-trial discovery of potentially embarrassing private information. The trial court ordered the plaintiff to comply with the discovery requests, but entered a protective order prohibiting the newspaper from publishing the private information obtained through the discovery process. The newspaper appealed, insisting (as the newspaper has insisted here) that the First Amendment gave it a license to publish anything which came into its hands, by whatever means. This Court balanced the privacy rights of the plaintiffs and the State's interests in the judicial discovery process against the newspaper's First Amendment rights, and held that the protective order, although a clear impingement on First Amendment rights, was fully justified by the more compelling interests at stake, and therefore a proper limitation upon the First Amendment. Clearly, it is this type of "balancing test" which provides the appropriate jurisprudential mechanism for resolution of the instant case.

4. The plaintiff's interests and the State's interests are clearly substantial, and the First Amendment interest is negligible.

Because a "balancing" of the competing interests involved here is clearly required to determine whether the newspaper's First Amendment rights prevent enforcement of the plaintiff's privacy rights, we turn to that clearly necessary task. We begin with the plaintiff's rights. Those rights are clearly substantial. In the first place, there have been significant developments in the decisional law since *Cox* was decided, and it is now settled that the United States Constitution contains a constitutional right of privacy which protects "the individual interest in avoiding disclosure of personal matters". *Whalen v. Roe,* 429 U.S. 589, 599 (1977). *Accord, Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979); *Fadjo v. Coon,* 633 F.2d 1172 (5th Cir. 1981). *See Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984). *See also Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986).

In addition, the plaintiff's common law right of privacy, which clearly encompassed the right to prevent disclosure of embarrassing private details of her life, has existed for nearly a half-century in Florida. *See Cason v. Baskin,* 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430 (1944). That right was also recently elevated to constitutional dimension in Florida by the addition of a "right of privacy" to the Florida Constitution. Article I, §23, Fla. Const. *See Winfield v. Division of Pari-Mutuel Wagering,* 477 So.2d 544 (Fla. 1985); *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla. 1987); *Doe v. Sarasota-Bradenton Florida Television Co., Inc.,* 436 So.2d 328 (Fla. 2nd DCA

1983). It also goes without saying that this common law and constitutional right of privacy is fully protected in the instant case by statute—specifically, the confidentiality exception to the Public Records Act and §794.03—both of which are strong expressions of the public policy of the State of Florida.[8]

There are practical matters to be weighed in the balance as well. Because a sexual crime intrudes upon the most private area of a woman's personality, the publication of a rape victim's name by the mass media is almost certain to cause acute embarrassment, humiliation, and shame. Surely, if the right of privacy protects *anything at all*, it protects a rape victim from such public trafficking in her name. Any other conclusion, we submit, would mean that the right of privacy protects nothing at all.

Publication of a rape victim's name may also subject the victim to follow-up harassment by the rapist or others, as it did in this case, requiring the victim to change her residence and phone number, as it did in this case—and perhaps, in egregious cases, requiring the victim to change her job, identity, and the like. There is also the matter of the physical safety of the rape victim, who is ordinarily the only eyewitness capable of identifying her assailant. If her anonymity is maintained, she may be able to assist the state in bringing her assailant to justice. However, if her name is publicly disseminated by the mass media within days after the crime and before the assailant is ap-

8. This "right of privacy" is not unique to Florida, of course; it is nearly universal. *See Cox Broadcasting Corp. v. Cohn, supra* at 487-89; Restatement (Second) of Torts, §652D. The fact that only a handful of states have statutes like §794.03 therefore ought to be irrelevant here, since the conduct found actionable in this case would probably be found actionable in any state which recognized an actionable right of privacy.

prehended, as it was in this case, she may very well be targeted for murder by the rapist to eliminate the possibility of his apprehension—which is why the newspaper's publication of B. J. F.'s name required her to seek police protection.

There is no need to belabor these practical matters concerning the psychological and physical well-being of rape victims, of course, because this Court has already declared them to be interests sufficiently compelling to justify the closure of a public rape trial on a case by case basis, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982). And if those interests are sufficiently compelling to support that limitation on First Amendment interests *after* the assailant has been apprehended and brought to trial, they are more than sufficiently compelling to support a limitation upon First Amendment interests when the assailant is still at large.[9] Clearly, non-disclosure of the identity of a rape victim is a socially desirable policy of the highest order and justification, which lies at the very core of the constitutional right of privacy—and not even the newspaper has dared to argue very strenuously to the contrary.

There is an additional interest to be weighed in the balance here—the State's interest in encouraging rape victims to report the crimes to police. The two statutes in issue here—the exemption from Florida's Public Records Act and §794.03—are obviously designed to guarantee the

9. In this connection, we remind the Court that the rape victim in *Cox* (upon which the newspaper primarily relies), did not survive the assault, and that the privacy interest being asserted in that case was that of the victim's *father*, not the victim. The "compelling interests" recognized in *Globe Newspaper Co.* and implicated by the facts in this case were therefore not available for "balancing" in *Cox*.

anonymity of victims to that highly desirable end. If the newspaper is successful here, however, the law will be that a minor slip-up by the police in their recordkeeping duties will provide legal approval for public identification of the victim on the evening's television news or in the next day's newspaper—and the likely result will be that few rape victims will have the courage to report their assaults. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 766 (1986) ("A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly."). The "undisputed problem of the underreporting of rapes" is already serious enough.[10] And that problem certainly needs no compounding by an announcement from this Court that immediate identification of a rape victim in the mass media, as a consequence of her report of the crime to a less than efficient clerk at the police station, is a constitutional right owned by the press—for which no redress will lie.

These considerations were the subject of recent examination in the Supreme Court of Canada, in *Her Majesty the Queen v. Canadian Newspapers Co., Ltd.*, [1988] 1

10. *Globe Newspaper Co. v. Superior Court, supra* at 617 (C. J. Burger, dissenting). Although the former Chief Justice read the majority's opinion as rejecting the Commonwealth's argument that its closure statute was "justified by its interest in encouraging minors to report sex crimes" (*Id.*), we do not read the majority's opinion that way. As we read that opinion, the Court was unimpressed with the argument that the closure statute served to encourage rape victims to testify at trial, and to testify accurately. In our judgment, there is a considerable difference between testifying at trial after an assailant has been apprehended, and reporting the crime in the first place—and we do not believe the Court meant to say that a state has no legitimate interest in encouraging the initial reporting of a rape by guaranteeing the anonymity of the complainant.

S.C.R. 122. The issue presented was whether the Canadian Constitution's guarantee of "freedom of the press" prevented the entry of a statutorily-authorized court order, when requested by a rape victim, "directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast". The Court concluded that the limitation upon the press effected by such an order was "reasonable" and "demonstrably justified in a free and democratic society", because it served to protect a rape victim's privacy and further the Crown's interest in encouraging an initial report of the crime (at little expense to the press)—and it held that the statute authorizing such an order therefore did not impermissibly violate the Canadian Constitution's guarantee of "freedom of the press". We commend both the reasoning of that decision and its conclusion to this Court.

In short, the several interests to be placed on the plaintiff's side of the scale here are both clearly substantial and highly compelling. To be balanced against these substantial interests is the newspaper's First Amendment right to print the news. In our judgment, that right is wholly insubstantial on the facts in this case. The newspaper, borrowing from an offhand assertion in *Cox Broadcasting Corp. v. Cohn*, insists that a rape is a crime, and therefore a matter of "public interest" about which the public should be informed without fear of civil or criminal liability. *Cox* does not really say that, however.

What the Court said in *Cox* was this:

> Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter

> was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.
>
> The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized. . . .

420 U.S. at 492. This statement, it must be remembered, was made in an entirely different context than the context presented in the instant case. In *Cox*, the name of the rape victim was learned in a judicial proceeding open to the public—and it was therefore the "operations of government" which were being reported by the defendant, not merely the commission of a crime. In addition, the civil action brought against the defendant asserted the privacy right of the deceased victim's father, not the victim. Read in this context, the statement cannot fairly be read to mean that the mere name of a surviving rape victim, by itself (and shorn of all the remaining factual circumstances of *Cox*), is a matter of "legitimate concern to the public" which "fall[s] within the responsibility of the press to report the operations of government".

We agree that the crime of rape itself, and perhaps even the identity of the assailant, if known, are matters of public concern—but we cannot agree that the mere *name* of the rape *victim* is a matter of any public concern at all, especially when the victim is alive, and her assailant is still at large. Indeed, the only *legitimate* concern which the public could have in that circumstance is for the continued anonymity of the victim. It can also fairly be

asserted that the Florida legislature has determined, as a matter of public policy, that the identity of a rape victim is not a matter of legitimate public concern, since it has exempted such information from the Public Records Act and made its publication a crime. And, of course, deletion of B. J. F.'s name from the newspaper's story would not have diminished the newsworthiness of the story in any conceivable way—which ought to be a positive measure of the lack of any "legitimate public concern" in knowledge of her name.

Perhaps most importantly, the newspaper itself more or less *conceded* below that the identity of a rape victim is not of sufficient public concern to justify its publication, by conceding that the journalists' code of ethics, the newspaper's own policy, and the policies of most members of the media prohibit publication of a rape victim's name. Surely, if the media itself has determined that the public interest in learning the identity of a rape victim is insufficient to outweigh the substantial privacy interests of the victim, which is what the record in this case presently reflects, then this Court should have little difficulty in reaching the same conclusion. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (erroneous report of corporate bankruptcy in credit-reporting newsletter not a matter of "legitimate public concern").

We should also note that this Court has recently shifted its emphasis in this area, and matters of mere "public concern" are no longer the touchstone of First Amendment protection. Today, the touchstone of First Amendment protection is largely status-related—greater protection being afforded to the publication of information about public officials and public figures, lesser protection

being afforded to the publication of information about private individuals, like the plaintiff in this case, and their private concerns, like the fact of her rape. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1970); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra; Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 757 (1986).

These recent developments clearly require that something more than mere "public concern" be demonstrated to support the newspaper's position, since B. J. F. is the quintessential "private person" in this Court's First Amendment lexicon. *See Time, Inc. v. Firestone, supra.* And since the newspaper cannot even demonstrate minimal "legitimate public concern" in the publication at issue here, we respectfully submit that its First Amendment interests are negligible here. We also respectfully submit that the "balancing test" required of this Court in this case will admit of only one defensible result: the plaintiff's substantial constitutional, statutory, and common law interests in avoiding disclosure and publication of her name, coupled with the State's interest in furthering the reporting of sexual crimes, far outweigh any chimerical interest (an interest which, in this case, the newspaper has itself disavowed by its own policy) which the newspaper might have in violating the statutes involved here and egregiously invading the plaintiff's privacy in the process.

We are not alone in that conviction. An eminent, well-respected constitutional scholar has urged that conclusion as well:

> . . . Within this zone [of the conflict between speech and privacy], there can be no escape from continuing efforts to accommodate the value of uninhibited public discussion with the value of preserving control for individuals over what is known and said about them by and to others.
>
> Finally, there comes a point at which only this latter value plays a significant role in a case—a point at which such public discussion as occurs is wholly parasitic upon a clear invasion of an individual's right to retain control over personal information. Nothing in the Court's defamation decisions, and nothing in the three decisions coming closest to addressing the conflict between speech and privacy, remotely suggests that, when this point is reached, government must exalt an abstract right to know, here reduced to a right to gossip, above the deeper concerns of personhood. On the contrary, once this point is reached, it would deprive individuals of liberty or property without due process of law to provide no legal remedy.

Tribe, *American Constitutional Law*, pp. 889-90 (2nd Ed. 1988) (footnotes omitted). In essence, of course, this is precisely the conclusion reached in the instant case by the court below. We respectfully submit that the lower court correctly balanced the competing interests at stake here, and that its resolution of that balance should therefore be affirmed.

5. The First Amendment does not provide an absolute license to publish damaging facts merely because they are true.

A final word is in order concerning the newspaper's absolutist position here—its contention that the First Amendment absolutely protects it from any civil rem-

edies for publishing "the truth", whether others' rights are trammeled in the process or not.[11] Because truth is such a valuable commodity, the argument has an inarguably nice ring to it. But the fact of the matter is that publication of the truth in some circumstances can be just as damaging as publication of a lie. The argument therefore needs to be cautiously approached and carefully analyzed before the flag of mere truth is raised and all other banners retired.

Although the contention has been raised many times in this Court, it has never been adopted. Instead, the Court has "eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented". *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979) (C. J. Rehnquist, concurring). In other words, as we have previously demonstrated, the Court has utilized a "balancing test" to weigh the competing interests at stake in a given controversy—and it has not infrequently come down on the side of authorizing remedies for publication of "the truth". *See, e. g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment does not prohibit civil damage remedy for invasion of one branch of the right of privacy known as the "right of publicity"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (First Amendment does not prohibit civil damage remedy for unauthorized publication of quotations from public figure's unpublished manuscript); *Haig v. Agee*, 453 U.S. 280 (1981) (First Amendment does not prevent Secretary of State from revoking passport of former CIA employee to prevent him from speaking abroad and damaging national security); *Snepp v. United States*, 444 U.S. 507 (1980) (First Amendment does not prohibit imposition of constructive trust upon proceeds of book published by former CIA employee in violation of employment agreement); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (First Amendment does not prohibit state from disciplining attorney for unauthorized in-person solicitation of client).

11. This absolutist contention was never made below, so the Court could properly decline to consider it if wished. If the Court accepts our contention that a "balancing test" is the appropriate jurisprudential mechanism for resolving the controversy, however, it will necessarily have rejected the newspaper's absolutist position—so the contention probably cannot be avoided. We will therefore address it briefly on the merits.

On occasion, the Court has even authorized prepublication "prior restraints" on publication of "the truth". *See, e. g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (First Amendment does not prohibit protective order proscribing publication of private matters obtained through discovery process); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. ....., 107 S. Ct. 2971, 97 L. Ed.2d 427 (1987) (First Amendment does not prohibit Congress from granting exclusive right to use of the word "Olympic" to United States Olympic Committee, and use of word by another organization could properly be enjoined); *Near v. Minnesota*, 283 U.S. 697 (1931) (in dictum, publication of troopship sailings during wartime may be enjoined).

If the newspaper's absolutist contention—that the First Amendment absolutely protects publication of "the truth", no matter how obtained and no matter how damaging—is accepted here, then all of those decisions (and others) will arguably have to be overruled. In addition, of course, to adopt that position is necessarily to declare

that no action will lie for invasion of privacy caused by public disclosure of embarrassing private facts—which is tantamount to declaring that the citizenry simply has no right of privacy in embarrassing private facts. Since the seminal article espousing such a right appeared in 1890, however, that right has obtained nearly universal acceptance in our nation's jurisprudence. *See* Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Harper, James and Gray, *The Law of Torts*, §§9.5-9.6 (2nd Ed. 1986); Prosser and Keeton, *The Law of Torts*, §117 (5th Ed. 1984); Tribe, *American Constitutional Law*, Ch. 15 (2nd Ed. 1988); Restatement (Second) of Torts, §652D, and comments thereto.

To accept the newspaper's contention would therefore be to wipe out, in a single stroke of the pen, nearly a century's worth of developing law thought vital for the protection of the dignity of personhood:

> In an information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the fourteenth amendment does not reserve to individuals some power to say when and how and by whom that information and those confidences are to be used would be to denigrate the central role that informational autonomy must play in any developed concept of the self.

Tribe, *supra* at 1400. We do not believe the Court is prepared to do that. Instead, the Court should retain the jurisprudential mechanism by which it has always resolved clashes of sharply conflicting interests—the "balancing test" which we have previously explored.

We should also note that the law which has developed in the last century in this area has not been insensitive to First Amendment concerns, and it has carefully crafted limits upon the tort of public disclosure of private facts. The primary limit is that the tort does not extend to the public disclosure of private facts if they are of "legitimate concern to the public". *See Connick v. Myers*, 461 U.S. 138, 143 n. 5 (1983) ("The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present."); Restatement (Second) of Torts, §652D; *Jacova v. Southern Radio & Television Co.*, 83 So.2d 34 (Fla. 1955); *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA 1980), *review denied*, 431 So.2d 988 (Fla.), *cert. denied*, 464 U.S. 893 (1983).

Although this Court has never decided if the First Amendment itself contains such a limitation upon the tort of public disclosure of embarrassing private facts, if any limit upon the tort is to be found there, we respectfully submit that the line should be drawn where the developing law has anticipated it—where the private facts are of "legitimate public concern". Since, as we have previously demonstrated, B. J. F's *name* was not a fact of any important public concern beyond its mere gossip value—indeed, that the more legitimate public concern ought to have been in B. J. F.'s continued anonymity—we respectfully submit that, if constitutional lines are to be drawn, the facts in this case should be excluded from the protection of the First Amendment. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976) ("public controversy"—and, by analogy to the instant case, "legitimate public concern"—requires considerably more than

mere "public interest"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (for a fact to be a "matter of public concern", it must concern a "public issue").

B. Three of the newspaper's miscellaneous contentions were not preserved for review, and they are without merit in any event.

At least three of the newspaper's miscellaneous contentions were neither raised in nor decided by the lower court. The Court therefore can and should decline to entertain them. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. ....., 108 S. Ct. 1645, 100 L. Ed.2d 62 (1988). The contentions are without merit in any event. We will address each of them separately.

1. The "overbreadth" challenge was waived below, and is without merit.

Although the newspaper did argue at trial that §794.03 was unconstitutionally "overbroad", even if we were correct that it was constitutional "as applied", the newspaper did not raise this challenge in its initial brief on appeal. Under Florida law, the challenge was therefore waived. *See* footnote 6, *supra*. It is also apparent from the lower court's decision that the issue was not decided. We therefore believe that the contention should not be decided here.

In any event, the contention is without merit because Florida courts have given §794.03 a saving construction consistent with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)—holding that the media can incur no civil

or criminal liability for the publication of a rape victim's name where the name of the victim is in the public domain. *See Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2nd DCA 1983); *Williams v. New York Times, Inc.*, 462 So.2d 38 (Fla. 1st DCA 1984). In the instant case, the trial court construed the statute in that manner; the district court of appeal cited *Doe* with approval; and the district court affirmed the plaintiff's judgment only because, as it explicitly noted, B. J. F.'s name was "non-public information". *The Florida Star v. B. J. F.*, 499 So.2d 883, 884 (Fla. 1st DCA 1986), *review denied*, 509 So.2d 1117 (Fla. 1987).

Thus construed (and if the statute is not unconstitutional "as applied"), the statute is not unconstitutionally "overbroad". In addition, of course, to declare the statute unconstitutional on its face would eliminate its operation in areas in which it would be constitutional, and it therefore deserves to be saved. *See Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (Declining to declare right of privacy statute unconstitutional on its face, where state courts had "been assiduous in construing the statute to avoid invasion of the constitutional protections of speech and press"). *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See generally* Tribe, *American Constitutional Law*, §§12-28 through 12-29 (2nd Ed. 1988).

Just as importantly, declaring §794.03 unconstitutional on its face would be an entirely academic exercise in this case, at least with respect to its result. As we explained in our statement of the case, the plaintiff's action was a common law action for negligent invasion of privacy; and §794.03 was utilized simply as a legal definition of the minimum standard of reasonable care

required under the circumstances, justifying a determination that the newspaper's conduct was negligence *per se*. *See* footnote 4, *supra*. If the statute is declared unconstitutionally overbroad, the relief required will not be entry of a judgment in the newspaper's favor. Rather, a new trial of the plaintiff's common law action for invasion of privacy would be required, without the benefit of the statute as a legislative determination of the minimum standard of care. At such a trial, the jury would be asked to determine as a matter of fact whether the newspaper acted with reasonable care under the circumstances with respect to the privacy rights of the plaintiff. *See Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430 (1944).

In the instant case, however, the jury found as a fact that the newspaper acted with "reckless indifference" to the plaintiff's privacy rights—a finding which we will defend in a moment, and a finding which clearly subsumes and includes a determination that the newspaper failed to act with reasonable care under the circumstances. The newspaper has therefore already been found liable for a breach of the standard of care which would govern any retrial of its liability if §794.03 were to be declared unconstitutionally overbroad here. As a result, the lower court's determination should be affirmed here, even if the newspaper is correct that §794.03 is unconstitutionally overbroad. *See Time, Inc. v. Firestone*, 424 U.S. 448, 462 (1976) (where record contains finding of fault sufficient to satisfy constitutional requirements, Court is "required to affirm the judgment below", notwithstanding that the judgment is bottomed upon a legally erroneous view of the Constitution). For all of these reasons, we respectfully submit that the newspaper's overbreadth

challenge need not be reached, or should be declared without merit.[12]

2. The contention that the newspaper was impermissibly found "strictly liable" was not raised below, and is without merit.

In an effort to fit itself within the First Amendment's requirement that "fault" be proven in defamation cases, the newspaper contends that it was impermissibly found "strictly liable" below. This contention was not raised in any form in any court below, and it is therefore not properly before this Court. In any event, it is clearly without merit. As noted previously, the parties stipulated before trial that the plaintiff's action was a negligence action.[13] And when the plaintiff moved for a directed verdict on the issue, she did not contend that the news-

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12. The newspaper's (and its amici's) additional contention that the statute is "underinclusive" deserves no more than a footnote in response. The contention was never raised below in any form, and it does not appear to be an appropriate challenge in the context of First Amendment claims. In any event, the contention is without merit because the tort in issue here depends upon widespread, general "publicity" without the plaintiff's consent. *See* Restatement (Second) of Torts, §652D and Comment a. As a result, the hypotheticals which the newspaper and its amici have advanced in support of their claim of "underinclusiveness" are simply not actionable in the first instance, and the Florida legislature could therefore reasonably exclude publicity other than by the mass media from the reach of §794.03.

13. At first blush, an action for invasion of privacy to redress publication of embarrassing private facts does not appear to be a "negligence" action at all. On closer examination, however, the tort turns out to be a species of negligence, because liability pivots upon the question of whether a "reasonable man" would have found the published facts "highly offensive" and withheld publication of them as a result. *See* Restatement (Second) of Torts, §652D. Since the conduct of a hypothetical "reasonable man" is the yardstick by which negligence is measured in the law of torts—*see* Restatement (Second) of Torts, §283—the parties' stipulation that B. J. F.'s action was a negligence action would appear to have been justified.

paper was "strictly liable"; she contended that §794.03 established the minimum standard of care under the circumstances, and that the newspaper's admitted violation of it was therefore negligence *per se*. The trial court granted this motion and thereafter instructed the jury that the newspaper "was negligent" as a matter of law. That is a determination of *negligence*, not imposition of strict liability—and the fact that the determination of negligence was made by the trial court rather than the jury simply does not justify the newspaper's claim that it was found liable "without fault". *See Time, Inc. v. Firestone*, 424 U.S. 448, 461-62 (1976) (determination of fault by either jury or court is sufficient to satisfy the constitutional requirement for proof of "fault" in a defamation case).

Just as importantly, the jury *did* return a finding of "fault" in this case. By assessing punitive damages against the newspaper, the jury necessarily found as a fact that the newspaper had acted with "reckless indifference" to the plaintiff's privacy rights. That finding (not to mention the newspaper's concession in closing argument that it was "at fault") indisputably amounts to a finding of "fault"—so the newspaper clearly has no legitimate complaint here that it was found liable "without fault" below. For all of these reasons, we respectfully submit that the newspaper's contention that it was impermissibly found "strictly liable" below need not be reached, or should be declared without merit.

3. The newspaper's contention that its conduct did not justify the imposition of punitive damages was not raised below, and is without merit.

Finally, the newspaper devotes a page of argument to a contention that its conduct was inadvertent; that there

was no evidence that any of its employees had a "subjective awareness" of the "error"; and that the First Amendment prohibits the imposition of punitive damages upon it as a result. This contention was not raised in the lower court. And from all that appears in the record, the newspaper stipulated in the trial court that punitive damages were recoverable upon a finding of "recklessness"; it did not object to the jury instruction authorizing the jury to award punitive damages upon such a finding; and it did not effectively challenge the jury's finding of "reckless indifference" after the verdict was returned.[14] The contention is therefore not properly before this Court.

In any event, the contention is clearly without merit because the evidence fully supports the jury's finding that the newspaper acted with "reckless indifference" to the plaintiff's privacy rights. In the first place, as we noted in our statement of the case, Ms. Lotson conceded at trial that she knew she was not supposed to copy B. J. F.'s name from the police report, but she copied it anyway and passed it along to a staff reporter.[15] The reporter who wrote the story also conceded that B. J. F.'s name should not have been included in any story reporting a rape, but she excused her so-called "error" on the ground that she viewed the crime she reported merely as a robbery. Since the article she wrote stated that the assailant "placed a knife to her neck . . . then undressed the lady and had

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14. The newspaper inserted such a challenge in its motion for new trial (R. 23). The trial court ultimately held that it had been divested of jurisdiction to rule on the motion by the newspaper's notice of appeal, however, and declined to rule on it (J.A. 40). This ruling was upheld by the district court of appeal, which held that the motion had been abandoned.

15. Ms. Lotson's subsequent recantation of this damaging admission did not remove it from the jury's consideration. Under Florida law, the jury was entitled to believe the admission and disbelieve the recantation. *See* footnote 3, *supra*.

sexual intercourse with her before fleeing the scene . . .", this explanation was clearly incredible on its face—or at least a jury would be fully justified in finding that the reporter knew that the story she wrote impermissibly included the name of a rape victim.

Finally, the newspaper's owner, publisher, and managing editor testified that four additional persons in the supervisory chain, all of whom were charged by him with a responsibility to ensure that no rape victim's name be reported in the newspaper, failed to do their job in this case. In short, the evidence reflects that six people who *knew* that a rape victim's name was not supposed to be published either wrote or read a story identifying B. J. F. by name as a rape victim, and allowed it to be published. Without belaboring the point, we think this evidence was sufficient to support a jury finding that the newspaper *intentionally* violated B. J. F.'s acknowledged privacy rights, and it is therefore more than sufficient to support the jury's lesser finding that the newspaper's conduct was "recklessly indifferent" toward those acknowledged privacy rights on the facts in this case. For all of these reasons, we respectfully submit that the newspaper's contention that its conduct did not justify the imposition of punitive damages need not be reached, or should be declared without merit.

CONCLUSION

It is respectfully submitted that the judgment of the District Court of Appeal of Florida, First District, should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE FLORIDA STAR,
Appellant,
vs.
B.J.F.,
Appellee.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

The Appellant must correct certain inaccuracies in the Appellee's brief, not merely for the sake of accuracy, but because they bear on resolution of the Federal question.

The Florida Star simply did not "purloin" the Appellee's name from the police nor, as is implied, did it "steal and publish statutorily protected material with impunity." (Brief in Opp. p.18). Its conduct cannot be analogized to "shoplifting." (Brief in Opp. p.20). The record clearly and indisputably reflects that the Florida Star obtained the information from a police incident report which was placed by the Sheriff's department in a designated press room. (T.Tr.108-11). Resulting publication of B.J.F.'s name was an unintended departure from the Florida Star's self-imposed policy to withhold such information, and certainly not an act of impunity.

The publication in question was very short and appeared on an inside page of the paper in a section with many other summaries of police incidents. (T.Tr.96,98). It does not amount to the implied "public trafficking in [the Plaintiff's] name." (Brief in Opp. p.30; *see also* p.23).

This suit was never brought as a matter of common law negligence. The plaintiff's sole theory was negligence *per se* implied by § 794.03, *Fla. Stat.* (1987). Neither the elements of common law invasion of privacy[1] nor this Court's scienter requirement[2] were pleaded or proven. The Appellee's assertion (Brief in Opp. p.9 n.4) and its amicus Pacific Legal Foundation's like assertion (Pacific Legal Foundation brief p.3) are contrary to both the Amended Complaint, which only alleges a *per se* theory of negligent violation of § 794.03 (J.S.A. 8-10), and to the trial court's ruling in directing a plaintiff's verdict on negligence ("I think it is a matter of law they have committed negligence *per se*"). (J.A. 30). Much is made of the Pre-trial Statement and its purported characterization of this action as one in negligence.[3] A close reading demonstrates that the Pre-trial Statement

1. This *per se* action avoids requirements to prove disclosure or the existence of a private fact. Also, the Amended Complaint failed to allege publicizing a matter which is "highly offensive to a reasonable person," Restatement (Second) of Torts § 652D(a), and "not of legitimate concern to the public." Restatement (Second) of Torts § 652D(b). Moreover, the commentary to § 652D suggests a defense not permitted here:

> There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record. . . .

2. Time, Inc. v. Hill, 385 U.S. 374 (1967).

3. B.J.F.'s trial counsel candidly admitted he was proceeding on the Amended Complaint (T.Tr.72), which of course only alleges an implied, statutory theory of negligence *per se*.

does not contain any of the standard elements of a common law claim for invasion of privacy. Rather, the Pretrial Statement makes this sole reference:

> (2) Did Defendant negligently violate Section 794.03, Florida Statutes?

(J.A. 7).

Indeed, the trial court directed a verdict for the Plaintiff solely on the ground of negligence *per se* implied from this statute (J.A. 30), and Plaintiff's trial counsel characterized his client's case in those same terms. (T.Tr. 135-136).[4]

The record does not support the Appellee's assertion that the sheriff's office press release was "inadvertent" (Brief in Opp. p.19) or the result of a clerk's error. (Brief in Opp. p.14). In fact, no one from the sheriff's office testified at trial, and sheriff's records were not placed into evidence.

Much is made of the reporter-trainee's awareness of a note on the sheriff's office bulletin board concerning the identification of rape victims. Notwithstanding the undisputed fact that the trainee's only responsibility was to copy information verbatim (she had no involvement in writing news reports), the evidence at trial never established whether the note was posted before or after the publication in question. (T.Tr.113-117).

The record contains no support for the proposition that the Appellants had any knowledge of Chapter 119 of the Florida Statutes, although Appellees assert that they did. (Brief in Opp. p.20). As discussed in greater

4. There being no preservation of a common law claim, there is no basis for the Appellee's indirect request for a new trial on this issue. (Brief in Opp. p.44).

detail below,[5] Florida's Public Records Act does not apply to the press and contains no language to place the press on any notice of the novel construction suggested by Appellee. Exemptions to the Public Records Act only serve to relieve records custodians from the obligation of otherwise mandatory disclosure of certain information.

Appellee makes a number of other factual misstatements which are more in the nature of matters of jury appeal than matters germane to the resolution of constitutional questions.[6]

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5. *See* pp.8-9, *infra*.

6. Appellee's brief indicates she learned of the publication while she was in the hospital recovering from the assault (Brief in Opp. p.5), but that was not the reason for her hospitalization. (T.Tr.36-37). Her brief also indicated she was receiving counselling solely for the effects of publication (Brief in Opp. p.6), but she reluctantly admitted at trial that this counselling was also for the effects of the rape itself. (T.Tr.38). Contrary to Appellee's frequent assertions (Brief in Opp. pp. 12-14,24), the record does not indicate whether the assailant was apprehended. The only reference to this effect comes from the contemporaneous news report itself (Jurisdictional Statement p.A14), but there is nothing concerning the subsequent two year period from the date of publication to the date of trial. It is mere conjecture, not a proven fact (T.Tr.42), that the threatening phone call received by B.J.F.'s mother was a result of the perpetrator reading B.J.F.'s identity within the police blotter article published by the Florida Star. *Cf.* Brief in Opp. pp.6,13,30.

ARGUMENT

I

THE STATUTE, WHICH IMPOSES CIVIL AND CRIMINAL PENALTIES FOR PUBLISHING TRUTHFUL INFORMATION LAWFULLY OBTAINED FROM A GOVERNMENT RECORD, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

A. *COX BROADCASTING V. COHN* MANDATES REVERSAL.

1. This case is indistinguishable in all critical respects from *Cox Broadcasting*.

Proceeding from the faulty premise that the Florida Star "purloined" the sheriff's department press release, B.J.F. argues that the holding of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 492 (1975) does not apply here. B.J.F. suggests that the *Cox Broadcasting* holding is limited by the facts of that case, and finally, submits that *Cox Broadcasting* should be overruled. (Brief in Opp. p.24 n.7).

On the first point, the uncontroverted evidence demonstrates that the Florida Star obtained an official police report, which contained B.J.F.'s name, from a routine press release at the Duval County Sheriff's Department's press room. This report was not purloined; it was not stolen; it was not shoplifted; and, the Florida Star did not publicly traffic in it.

The *Cox Broadcasting* holding is expressed in broad terms, not limited by the specific facts of that case:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy

> interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests and privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.

420 U.S. at 496-97. This case fits squarely within the core holding of *Cox Broadcasting*.

Appellee has left unanswered the suggestion that there is no distinction between information lawfully obtained from the government generally, whether from the judicial or the executive branch. The rule of law established in *Cox Broadcasting* is not limited to the facts that the rape victim was dead, that the assailant was apprehended, and that the privacy rights asserted were those of the father. *See e.g., Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So.2d 328 (Fla. 2d DCA 1983).

Rather than address the federal question on its merits, Appellee attempts to avoid the force of law of this Court's precedent by arguing technicalities of state law that do not affect the issue. Appellee engages in circular logic by arguing that since publication of a rape victim's name is prohibited by Florida statute, that information was not obtained lawfully. Of course, this analysis begs the question of whether a statutorily-implied, *per se* cause of action against a newspaper is constitutional, but evades its answer.

This Court in *Cox Broadcasting* has characterized "public records" broadly as "official records available to the public." 420 U.S. at 494 n.25. It is that definition, fully applicable to the police report and press release in question here, which determines the applicability of the *Cox Broadcasting* holding. To suggest that the sheriff's press release here was not a public record simply ignores the face of *Cox Broadcasting* reasoning. Appellee attempts to draw upon the semantics of Florida law to suggest that the police release here was not a public record.

Clearly, the right to publish information is a First Amendment question, the analysis of which does not begin and end with application of state law. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). A fair reading of this Court's precedent suggests that at a very minimum, when information is placed in the *"public domain"*, the press has a right to publish. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977) (emphasis added); *see also Cox Broadcasting*, 420 U.S. at 496.

Even when state law purports to regulate access to such information, once the government releases it, it may be published without fear of sanction. *Oklahoma Publishing Co., supra.* This Court has extended freedom to publish in the face of state law which makes information confidential, where that information is obtained not only from the government but from routine newsgathering procedures, *Smith v. Daily Mail Publishing Co.*, 433 U.S. 97 (1979), and even where news sources may have themselves violated law by releasing information. The analysis does not end with state law; First Amendment principles both limit the State's ability to enjoin publication, *New York Times v. United States*, 403 U.S.

713 (1971), and limit the state's ability to impose subsequent sanctions. *Landmark Communications, supra; Daily Mail, supra.*

Appellee reduces this argument to mere semantics, seizing upon the fortuitous fact that Chapter 119, *Fla. Stat.* makes elaborate provision for public access to "public records," to suggest that Florida statutes can control the applicability of *Cox Broadcasting*. Even so, Appellee incorrectly applies technicalities of state law to characterize a sheriff's press release as something other than a public record.[7]

This is a novel misapplication of a state law whose purpose is to maximize dissemination of government information to its citizens, not to justify censorship.[8]

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7. The Florida statute itself broadly defines a "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(1), *Fla. Stat.* (1987). Certainly a police incident report falls within the definition of a "public record," Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2d DCA 1986), *pet. for rev. den. sub nom.* Gillam v. Tribune Co., 503 So.2d 327 (Fla. 1987), although the Act further provides that certain information, including the identities of sex crime victims may be redacted from a public record. § 119.07(2)(a). The provision of this law relied upon by Appellee, § 119.07(3)(h), merely excludes information identifying sex crime victims from disclosural requirements, but it does not cross-reference this exclusion to the broad definitional provision of § 119.011(1). Thus a fair, precise reading leads to the conclusion that § 119.07(3)(h) does not alter the Florida law definition of the police incident report here as a "public record" but merely exempts victim-identifying information within the record from mandatory disclosure, providing for redaction of the public record as a means of achieving this exemption.

8. The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. The purpose for such inquiry is immaterial. . . The breadth of

(Continued on following page)

Public Records Act exemptions, such as 119.07(3)(h), are directed solely to records custodians and impose no restrictions whatsoever on press publication. Such exemptions merely exclude certain information from mandatory disclosure. They do not operate either to prohibit discretionary disclosure, or to prohibit publication. Nothing in the language of § 119.07(3)(h) provides the press any notice that it operates as a legislative prior restraint.[9]

To suggest otherwise, as Appellee does, proves too much. As more fully set forth in Appellant's initial brief,[10] B.J.F.'s interpretation that public records law exceptions amount to valid prior restraints against publication would withdraw from public discussion 310 different categories of information. Moreover, this analysis admits no limiting principles. By Appellee's logic, the Florida Legislature would be free to prohibit public discussion categorically by the mere artifice of enacting exceptions to its Public Records Act. This application is constitutionally impermissible and stands Florida's Public Records Act on its head.

Footnote continued—

such right is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability of government to maintain secrecy in the public interest.

Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985).

9. The pre-*Sullivan* Florida case of Patterson v. Tribune Co., 146 So.2d 623 (Fla. 2d DCA 1962), *cert. denied*, 153 So.2d 306 (Fla. 1963) offers no support. That case involved no First Amendment analysis, and reached a result contrary to *Cox Broadcasting* on similar facts. *Patterson* upholds a privacy action for an accurate news report based on an open court docket entry. Contrary to Appellee's implication (Brief in Opp. pp.18-19), *Patterson* did not construe Florida's Public Records Act.

10. Brief in Opp. pp.17-18 and n.16.

2. The First Amendment values recognized in *Cox Broadcasting* apply equally here.

Appellee attempts to trivialize the press interests in publishing lawfully obtained information derived from government reports, and thus fails to address the holding in *Cox Broadcasting* that:

> [t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

420 U.S. at 492.

In *Hustler Magazine v. Falwell*, ... U.S. ....., ..., 108 S.Ct. 876, 882 (1988), the Court rejected a similar argument that the parody there in question was so outrageous that it was beyond the pale of First Amendment protection. The Court reasoned that submitting such a subjective standard to a jury would allow a jury to impose liability based on its own views, thus violating the Court's "longstanding refusal" to permit damage awards for speech which has "an adverse emotional impact" on its audience. The jury award in effect here is no different. *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

3. Subsequent decisions reinforce and extend *Cox Broadcasting*.

While *Oklahoma Publishing Co.* and *Daily Mail* broaden and expand the application of *Cox Broadcasting*[11] Appellee incorrectly views these cases as being based on

11. *See* p.7, *supra*.

similar facts and thus inapposite to the case at bar. She ignores the trend which, far from limiting *Cox Broadcasting*, endorses and extends that decision. The attempted distinction of *Landmark Communications* as endorsing Appellee's suggested balancing test analysis overlooks the complete absence of a balancing mechanism in § 794.03 and its implied civil cause of action. Appellee addresses neither the *Landmark Communications* extension of First Amendment protections to publication of truthful information which is "withheld by law from the public domain," regardless of the press' source, 435 U.S. at 840, nor this Court's refusal to grant "[d]eference to a legislative finding . . . when First Amendment rights are at stake." *Id.* at 843.

The suggestion that § 794.03 permits any sort of balancing is erroneous. As applied here, that statute creates *per se* liability. There is no element of scienter. The statute contains no exceptions, such as for prior disclosures, or voluntary waiver by the victim. The statute allows no determination of newsworthiness (for example, former Florida Senator Paula Hawkins' press release about personal experience as a victim of child abuse). The statute does not limit its absolute prior restraint to account for subsequent developments such as apprehension, conviction or acquittal, or *Cox*-like disclosures in court proceedings or court documents. Finally, the statute applies only to news media and thus does not prohibit all disclosures.

4. It is the government's responsibility to maintain the confidentiality of its information, and this responsibility may not be shifted to the press through prohibitions on publication.

Presumably to support her argument that *Cox Broadcasting* should be overruled, B.J.F. draws from the "pen-

umbral right of privacy" cases. (Brief in Opp. p.29). Those cases are inapposite here, because they define privacy rights vis-á-vis governmental actions or disclosures and do not speak to the tension between privacy rights and a free, independent press.[12] Perhaps as a consequence, Appellee fails to address the admonition in *Cox Broadcasting* that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* at 496. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978) (". . . the government cannot restrain communication of whatever information the media acquire - and which they elect to reveal."). Here, state and federal law allocate squarely to the sheriff the burden of containing the offending information.

B. THE PRESS MAY NOT BE MADE CRIMINALLY OR CIVILLY LIABLE FOR PUBLISHING THE TRUTH.

Appellee scarcely addresses the question left open by *Cox Broadcasting*, whether truthful publication may ever be civilly or criminally punished. Appellee merely notes that the argument has a "nice ring to it" but asserts without much analysis that because the truth, in some circumstances, can be as damaging as publication of a lie, the government is justified in imposing sanctions for truthful publication.

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12. Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589, 599 (1977); Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). *See also*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986). *But see* Paul v. Davis, 424 U.S. 694, 712-14 (1976) (no violation of privacy right by state action publicizing official crime record).

The cases cited in support of this assertion do not pertain to news reporting on matters of public interest, here the commission of a crime. Instead, these cases touch on various aspects of commercial misappropriation, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. ....., 107 S.Ct. 2971 (1987); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), or on limitations which may be placed upon information provided by government to employees or litigants, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (protective order did not restrict "information gained from other sources"); *Haig v. Agee*, 453 U.S. 280 (1981); *Snepp v. United States*, 444 U.S. 507 (1980).

2. In a free marketplace of ideas and information, truthful publication may not be punished.

Remarkably, Appellee does not address this Court's recent decision of *Hustler Magazine v. Falwell*, its solicitude for truthful speech, or its requirement of fault or scienter in causes of action which are ancillary to claims of libel against the press. There, this Court rejected on First Amendment grounds the application of the tort of intentional infliction of emotional distress against press publication. The Court reasoned that such a tort would impermissibly alow juries to punish speech "on the basis of the jurors' tastes or views. . . ." *Id.* at 882.

Recently, the Court has reiterated its position that the " 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.' " *Boos v. Barry*, ... U.S. ....., ..., 108 S.Ct. 1157, 1163 (1988), *quoting Consolidated Edison*

Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980). There, the Court struck down a statute where "the government has determined that an entire category of speech —signs or displays critical of foreign governments—is not to be permitted." *Id.* "A 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler,* is so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact upon the audience.'" *Id.* at 1164, *quoting Hustler Magazine v. Falwell,* 485 U.S. ....., ..., 108 S.Ct. 876, 882 (1988).

Equally, either the *per se* or common law tort of embarrassing private facts invasion of privacy submits the identical question to the jury of whether the subject matter of publication is highly offensive to a reasonable person. *See* Restatement (Second) of Torts § 652D(a). Likewise, this tort which recognizes punishment of truthful publication, allows juries to pass on the exercise of editorial judgment in determining newsworthiness, a governmental exercise which this Court rejected in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

2. Section 794.03 operates as a legislative prior restraint imposing criminal and implied civil sanctions for publishing lawfully obtained, truthful information.

Appellee did not address this argument, even though prior restraint analysis is inherent in this Court's case law on the subject, *see, e.g., Daily Mail, supra* (because state statute punishes publication of "lawfully obtained, truthful information" it requires "highest form of state

interest to sustain its validity." *Id.* at 102-03). Prior restraint law was argued from the outset of this case. (T.Tr.74).

C. THE STATUTE AS APPLIED VIOLATES FUNDAMENTAL DUE PROCESS REQUIREMENTS OF PRIOR RESTRAINT AND CENSORSHIP LAW.

Appellee did not address this point.

D. THE PURPOSES SERVED BY § 794.03 ARE INSUFFICIENT TO JUSTIFY SANCTIONS AGAINST TRUTHFUL PUBLICATION.

Appellee incorrectly asserts that claims of overbreadth, under-inclusiveness of the statute, and the statute's disproportionate burden on the media were not preserved for this Court's review.

This Court has expressly stated that pursuant to the "mere enlargement doctrine, '[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.'" *Bankers Life and Casualty Co. v. Crenshaw,* ..... U.S. ....., ..., 108 S.Ct. 1645, 1650 n.2 (1988), *quoting Dewey v. Des Moines,* 173 U.S. 193, 198 (1899). Clearly, this Court has long recognized the ability of an appellant to fine tune his or her arguments on the way up the appellate ladder, so long as the foundation for those arguments has been presented at the first rung.

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and

> the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The federal question, the constitutionality of § 794.03, has been the major, ongoing theme throughout all stages of this litigation. The overbreadth challenge, in particular, was first addressed in the trial court. (T.Tr.75,127). In fact, that court specifically denied defense motions for directed verdict on overbreadth grounds. (T.Tr.135). This argument was further addressed at the state appellate level as evidenced in Appellant's reply brief in Florida's First District Court of Appeal at page 16-17; Amicus initial brief at page 17; Amicus reply brief at page 1.

E. PUNITIVE DAMAGES ARE IMPERMISSIBLE ON THIS RECORD.

With respect to the punitive damage award, Appellee again claims that the Florida Star never attacked the basis for this award. The record demonstrates that the Florida Star argued the inapplicability of a punitive damage award throughout the litigation, from its motion for a directed verdict in the trial court (T.Tr.72), to its appellate arguments in the Florida First District Court of Appeal. *See* Appellant's initial brief at page 14; Appellant's reply brief at page 15; Amicus initial brief at page 5.

II

STRICT LIABILITY SANCTIONS FOR THE PUBLICATION OF TRUTHFUL INFORMATION LAWFULLY OBTAINED IMPOSE AN UNCONSTITUTIONAL CHILLING EFFECT UPON FIRST AMENDMENT FREEDOMS.

Appellee's contention that the Florida Star never raised an argument based on the fact that they were found strictly liable for violation of the statute is equally without merit. Clearly, the finding of liability without fault was a key area of the Florida Star's concern throughout the litigation, particularly in light of the fact that the trial court itself instructed the jury that the Florida Star was negligent "as a matter of law." (T.Tr.168; *see* T.Tr.139). It was this ruling, based solely on the implied private cause of action, which formed a basis of Florida Star's argument throughout the appellate process. *See* Appellant's initial brief to the Florida First District Court of Appeal at page 7,14; Appellant's reply brief at page 13.

On the merits of this issue, Appellee argues in her brief that the defense witnesses' trial testimony admitted fault and that the jury's award of punitive damages necessarily subsumed a fault finding. Thus, so goes the argument, the liability here imposed was not strict liability despite the language of the Amended Complaint, the Pre-trial Statement, the directed verdict, the jury instructions or the opinion of the Florida First District Court of Appeal. This argument completely disregards well-established constitutional considerations.

As this Court has made clear in the defamation context, the imposition of liability without fault, based merely on a newspaper's publication of a falsehood, will not pass constitutional muster. "We hold that, so long

as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The *Gertz* Court itself equated "liability without fault" to "strict liability." *Id.* at 348 n.10.

"Liability without fault" in defamation law, of course, is "libel *per se*" and is functionally equivalent to "negligence *per se*" with regard to the publication of truthful information. In both actions publication alone conclusively establishes liability.

In Florida law, strict liability based on a statutory violation is a species of negligence *per se*. The leading case on statutory violations in civil litigation, *deJesus v. Seaboard Coast Line Railroad*, 281 So.2d 198, 201 (Fla. 1973), held that there are three types of statutes relevant to civil actions. That court later summarized this holding as follows: "The first category creates *strict liability or conclusively actionable negligence*, the second category comprises violations which provide proof of negligence, and the third category consists of violations which provide evidence of negligence." *Brackin v. Boles*, 452 So.2d 540, 545 (Fla. 1984) (emphasis supplied). The *deJesus* court had described the first and second types of statutory violations as "negligence *per se*." 281 So.2d at 201.

Thus, Appellee's somewhat attenuated discussion concerning the two terms draws a distinction without a difference, as far as Florida law is concerned. Under provisions of Florida law, negligence *per se* for a statutory violation and strict liability are the same. In each, it is the violation of the statute without more which engenders liability.

The Plaintiff's sole, consistent theory of this case is that liability stemmed strictly from the fact of publication itself. The Plaintiff argued this in her motion for directed verdict on liability:

> MR. BECKHAM: . . . I am simply pointing out the authorities of the charge or the authorities—it is uncontested here that they published it. It is uncontested what the law is, and it is uncontested that they publish[ed] it, so I think it is a matter of law they have committed negligence per se.

(T.Tr.136). The only "fault" at issue is the bare fact of publication, and the trial court's ruling on the motion makes clear that it was unconcerned with any scienter of the defendant or any testimonial admission of error:

> THE COURT: . . . I will adhere to my ruling that the motions of the defendant are denied and under the laws of the State of Florida as enunciated in the comments to [Standard] Jury Instruction 4.09 I believe it is—which are to the effect that the violation of the penal statute cannot be left to the decision of the jury as to whether or not that statute has been violated. I will grant the plaintiff's motion for directed verdict on the issue of negligence. And I will appropriately instruct the jury.

(T.Tr.139). The "violation of the penal statute" to which the trial court referred was merely the publication of the name of a sexual battery victim, not "knowing" or "willful" violation of the law. The statute presumes fault if the publication occurs, sufficient to warrant a criminal prosecution or the imposition of civil sanctions.

This presumed fault is repugnant to the First Amendment and contrary to this Court's reasoning in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and in *Gertz*,

supra, and *Falwell, supra*. Any attempt to argue that fault was not presumed from the mere fact of publication in this case is a misreading of what actually transpired.

CONCLUSION

This Court's response to a different Florida statute over a decade ago applies equally here and mandates reversal:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 258.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 87-329

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE FLORIDA STAR, *Appellant*,

vs.

B.J.F., *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE NEW YORK TIMES COMPANY, THE MIAMI HERALD PUBLISHING COMPANY, THE TRIBUNE COMPANY, THE TIMES HERALD PRINTING COMPANY, McCLATCHY NEWSPAPERS, INC., AND THE FLORIDA FIRST AMENDMENT FOUNDATION

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INTEREST OF AMICI CURIAE

Amici Curiae The American Newspaper Publishers Association, The Miami Herald Publishing Company, The New York Times Company, McClatchy Newspapers, Inc., The Tribune Company, The Times Herald Printing Company and The Florida First Amendment Foundation (the "Amici") file this brief in support of Appellant, *The Florida Star*. Appellants and Appellees have each consented to the filing of this brief. Their written consents are on file with the Clerk of this Court.

The Amici are, or represent, news reporters, editors, publishers, and broadcasters.[1] The *Amici* have a direct interest in the outcome of this appeal because they routinely report on the commission of crimes. This reporting often involves the publication of "police blotter" material

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1. The American Newspaper Publishers Association is a non-profit corporation whose membership consists of about 1,400 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The New York Times Company publishes 35 newspapers including *The New York Times*, a daily newspaper with a national circulation of 1.1 million daily and Sunday circulation of over 1.6 million. The Company owns 11 regional newspapers in Florida. The Company also publishes numerous national magazines and owns radio and television stations, as well as a cable television system.

The Miami Herald Publishing Company is a division of Knight-Ridder, Inc. a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida.

McClatchy Newspapers, Inc. owns and operates twelve newspapers in California, Washington, and Alaska with an aggregate circulation of approximately 700,000.

The Tribune Company publishes *The Tampa Tribune*, a daily newspaper of general circulation in the Tampa Bay area.

The Times Herald Printing Company publishes *The Dallas Times Herald*, a newspaper with a daily circulation of 240,000, and Sunday circulation of 380,000.

The Florida First Amendment Foundation is a not-for-profit organization of Florida publishers and broadcasters supporting the principles embodied in the First Amendment.

provided to "beat" reporters by law enforcement officers, and journalists characteristically rely in good faith upon those police disclosures.

This case is particularly threatening to the press throughout the country. The criminal statute from which the private action was implied punishes only *mass media publications* of the name of a person alleged to be the victim of a sex crime, not disclosures by ordinary speakers in nonmedia speech. The information published was true, and yet the newspaper was not allowed even to present a First Amendment defense. In fact, the trial court directed a verdict against the newspaper on the issue of negligence, ruling that a violation of the penal statute constitutes strict tort liability for the publication. The jury awarded $75,000 in compensatory damages, even though *The Florida Star* is a very small uninsured weekly newspaper unable to pay such an award.[2] A punitive damage award of $25,000 was added to the compensatory verdict despite the fact that the plaintiff's counsel requested only $18,000, and publication of the name here was inadvertent, not intentional. This punitive award alone is fifty times greater than the fine imposed by the penal statute from which the implied civil action was derived; the total civil damages awarded are two hundred times the maximum criminal fine.

The "chilling effect" of such a cause of action is obvious. The Amici join with *The Florida Star* and ask this Court to invalidate the creation of a rule of *per se* liability so insensitive to freedom of the press.

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2. Billard, "Truth Was No Defense," *The American Lawyer*, September, 1986.

STATEMENT OF THE CASE

The Florida Star is a "mom and pop" weekly newspaper that has been serving a portion of Jacksonville's black community for thirty-five years. The newspaper's staff has always been tiny. Its owner, Eric Simpson, is also the publisher, business manager, and chief editor of the paper. Reporter Girtha Morgan, one of the paper's three journalists, became the "paste-up artist" when her reporting was completed for the day. The weekly's circulation was only 18,000.

The Florida Star is known in Jacksonville primarily for its church news and local crime coverage. As with many small newspapers, a trainee reporter makes verbatim copies of the week's incident reports provided her by officers at the police station. In this instance, the intern, Jacquelin Lotson, made exact copies of incident reports she had received in good faith from the police. The copied reports, which included the investigation of a robbery and sexual assault on B.J.F., were accurately rewritten into the police blotter stories by Reporter Girtha Morgan and given to the proofreader prior to publication. The short article referring to B.J.F. was one of fifty-four police blotter stories published in the October 29, 1983 issue of *The Florida Star*. It appeared under the headline "Robberies," and read as follows:

> Betty Jean Freeman reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, en route to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch, and gold

necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence.

The article was completely truthful and lawfully obtained. It neither sensationalized the incident, nor reported lurid details of the attack.

The Florida Star had a long standing policy against publishing the names of alleged rape victims and had never before deviated from this policy in its thirty-five year history. Publication in this case was completely inadvertent and in good faith. Reporter Morgan testified that she considered the item a robbery report; she did not realize it was a rape. The proofreader did not note the reference to the sexual attack.

The Florida Legislature has not enacted any statute which provides a civil cause of action for the disclosure of the name of a person alleged to be the victim of a sexual assault. However, Florida has retained through the years a penal statute which makes it a misdemeanor in the second degree to publish or cause or allow to be published "*in any instrument of mass communication*" the name of the victim of any sexual offense:

> 794.03 Unlawful to publish or broadcast information identifying sexual offense victim.—No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 794.03, Florida Statutes. The statute does not purport to create a civil damages action, and the criminal penalties may not exceed 60 days in jail or a $500 fine.

B.J.F. ultimately filed a civil lawsuit sounding in two counts: Count I alleged a "negligent violation of §794.03 Florida Statutes" by the Sheriff of Jacksonville, and Count II alleged "*The Florida Star* intentionally, and with reckless indifference towards Plaintiff and Plaintiff's continued well-being, violated §794.03 Florida Statutes." The trial judge refused to allow the presentation of any First Amendment defense; ruled that Section 794.03 could serve as the basis for an implied private action; upheld the constitutionality of the statute; and directed a verdict for the plaintiff on the issue of negligence. He held that violation of the penal statute, by publishing B.J.F.'s name, constituted negligence *per se*.

The plaintiff's counsel, apparently recognizing *The Florida Star* had neither insurance nor resources sufficient to pay a substantial damage award, did not specify any particular amount for compensatory damages and requested punitive damages of only $18,000, one dollar for each purchaser of the paper. The jury, however, awarded $75,000 in compensatory damages and $25,000 in punitive damages. It is this verdict, which bears no relation even to what was requested by the plaintiff, and which *The Florida Star* cannot pay, that is presented for this Court's review.

SUMMARY OF ARGUMENT

The court below created an implied private right of action that is essentially without parallel in this country.[3] That the action implied here has no analog else-

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3. Although the trial court found the private right of action may be implied from Florida Criminal Statute Section 794.03,

(Continued on following page)

where is scarcely surprising since it wholly fails to strike an acceptable balance between First Amendment rights and any legitimate state concern.

This Court has circumscribed the power of the states to impose civil or criminal liability for the publication of truthful information that lies near the core of the First Amendment, even where that information is not in the public domain. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Truthful publications, even of confidential information, may be the target of state liability rules, if at all, only where a state interest of the highest order is implicated and the liability rule is narrowly tailored to serve that interest. *Smith*, 443 U.S. at 102-03. The private right of action created here does not begin to meet this test, and the absence of such statutes in forty-seven of our fifty states strongly suggests the implied action here serves no meaningful state interest, let alone one of the highest order.

First, the implied cause of action simply fails to serve a "privacy" interest. Neither the statute nor the implied action requires proof of publication of any "private fact". Whether the identity of the alleged rape victim is known throughout the community or not, its publication in the "mass media" is actionable. The statutory cause of action is thus in sharp contrast to Florida's common law invasion of privacy tort. Under Florida's

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Footnote continued—

the Florida Legislature has enacted no statutory civil cause of action. At the time of this Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), only three other states had similar criminal statutes *Cox*, 420 U.S. at 472 n.1; Today, only Florida, South Carolina, and Georgia have statutes punishing the publication of an alleged rape victim's name, *see infra* at p. 12.

common law, a plaintiff must prove the disclosure of a fact about his "private life" that is highly offensive to a reasonable person, and that the disclosure was not newsworthy. Only when disclosure is not newsworthy and would offend the sensibilities of an ordinary person does a common law action lie. The implied action under the statute was employed here to evade the careful balancing of interests required by the common law.

In fact, since non-media disclosures of the identity of the alleged victim are permissible under the statute, the implied action cannot be said to protect the privacy of the victim at all.[4] The statute does no more than single out mass media communications for special liability, a purpose which is itself unconstitutional. *See Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987); *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

The implied statutory action is as overinclusive as it is underinclusive. It imposes a broad strict liability rule for media publications. It does not require the careful case-by-case adjudication ordinarily mandated by the court even where intimate details of sex crimes are involved. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Here, of course, no such intimate details were published. The statute permits no exception for either consent by the alleged victim or for public policy considerations, such as when the credibility

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4. Since rape prosecutions in Florida must be tried in public, there can be no legitimate expectation of privacy in bringing an allegation of rape. Only during that portion of the trial of a sex offense in which testimony concerning a sexual assault is being given by a witness under the age of 16 may the public be excluded from the courtroom, and even then news reporters must be allowed to remain. Fla. Stat. §918.16 (1987).

of the complainant herself is at issue. While newspapers often choose not to publish the names of alleged rape victims, they do so when circumstances suggest the identity is relevant to newsworthy issues (such as witness misidentifications, racial prejudice, or perjury). Under the statute, the alleged victim herself could be prosecuted for disclosing her own identity to the press. The statute and the implied action supplant both the desires of the victim and the needs of society. Nor does the implied action offer the publisher the protection of a strict scienter element, as this Court has required in numerous other First Amendment contexts in which publications implicate privacy concerns. *See Hustler Magazine v. Falwell*, 485 U.S. ....., 108 S.Ct. 876 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

The facts of this case and the statute from which the civil action has been implied are most like those reviewed by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[5] The result in this case should be the same as was reached in *Cox*. The truthful information published in good faith by the *The Florida Star* was lawfully obtained from police records given the press by law enforcement officials and directly related to the commission of a crime. The press cannot be held strictly liable for tort damages under such circumstances.

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5. The Court in *Cox* specifically identified the Florida statute as a similar statute, and it has not been materially amended since *Cox*. B.J.F. has argued on appeal, but not in the trial court, that *Cox* has no applicability here because the information published was not a matter of public record. This argument was not only waived, it is incorrect because the lawful disclosure of the records to the press by their legal custodians placed them in the public domain.

ARGUMENT

I. THE STRICT LIABILITY ACTION IMPLIED BY THE COURT BELOW FAILS TO STRIKE A PROPER BALANCE BETWEEN FIRST AMENDMENT RIGHTS AND LEGITIMATE STATE INTERESTS

A. The Implied Private Action Punishes The Good Faith Publication Of Lawfully Obtained Truthful Information Concerning The Alleged Commission Of A Crime Without Serving A State Interest Of The Highest Order

The recent decisions of this Court "demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 102. This is true even when the publication is of information the state has determined should be confidential. *Id.; Landmark Communications, Inc. v. Virginia, supra.* It is also true regardless of whether the punishment is denominated "civil" or "criminal."

Both Section 794.03, Florida Statutes, and the private civil action implied from it by the court below, indulge in the dubious pursuit of punishing the truthful publication of speech in the mass media. By its express terms Section 794.03 criminally punishes publishing the name of the victim of any sexual offense, "in any instrument of mass communication." Similarly, the implied private action imposes substantial civil compensatory and punitive damages on *The Florida Star*.

Whether the sanctions imposed are denominated "civil" or "criminal," their punishment of the press for

the content of the expression published must be subjected to the most exacting scrutiny under the First Amendment. *Cox Broadcasting Corp. v. Cohn, supra; New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 277 (1964). In fact, this Court never sanctioned the award of punitive damages against the press in a case involving truthful speech. To the contrary, this Court has recognized that, even where speech is false, punitive damages, because "they are private fines levied by civil juries," must be strictly limited. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.[6]

This case is illustrative. The civil action created by the court carried with it a punitive damages award of $25,000, an amount 50 times greater than the maximum criminal fine of $500 for a second degree misdemeanor under Florida law. Section 775.083, Florida Statutes. The total civil damages awarded are two hundred times greater than the maximum criminal fine. As the Court noted in *Sullivan*:

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. [Citations omitted] Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving

6. The analogy to a criminal fine is especially appropriate in Florida where the Legislature has recently provided that 60% of all punitive damage awards are payable to the state. Fla. Stat. §768.73(2) (1987).

> moral turpitude," and which allows as punishment upon conviction of a fine not exceeding $500 and a prison sentence of six months. [Citations omitted] Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. . . .
>
> Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon criminal law." [Citations omitted]

376 U.S. at 277. The imposition of excessive civil damage awards on speech is as unconstitutional today in Florida as it was a quarter of a century ago in Alabama.[7]

Because the statute and its parasitic implied private action impose sanctions "for publishing lawfully obtained,

7. This Court has long recognized that unrestrained punitive damages awards "create hazards to protected freedoms." *New York Times,* 376 U.S. at 278 (*quoting Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963)); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778 (Brennan, J., Marshall, J., Blackmun, J., and Stevens, J., dissenting) (criticizing the "largely uncontrolled discretion" of juries to assess punitive damages); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 77 (1971) (Harlan, J., dissenting) (criticizing punitive damages awards unrelated to the actual harm done); *id.* at 82-83 (Marshall, J. and Stewart, J., dissenting) (criticizing punitive damages awards in libel cases concerning matters of public interest); *cf. Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1655 (1988) (O'Connor, J., and Scalia, J., concurring) (expressing view that punitive damages awards "may violate the Due Process clause").

truthful information," they require the "highest form of state interest to sustain [their] validity." *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 102-03. All of the Court's recent decisions involving such restraints "suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103.

There can be no serious claim that the publication here does not involve "a matter of public significance." This Court resolved that issue in *Cox*, stating that the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." 420 U.S. at 492. In *Cox*, this Court held that Georgia could not constitutionally impose liability on the press for the truthful publication of the name of the rape victim lawfully obtained from indictments given to the press by the Clerk of Court. *Id.* at 496-97.

There also can be little serious argument that the statute here serves a state interest of the highest order. In the first place, more than a decade ago, the Court determined that only four of the fifty states had enacted laws punishing publication of the name of a rape victim. *Cox*, 420 U.S. at 471 n.1. Today, only two states other than Florida retain such statutes.[8] It is scarcely credible to assert a state interest is of the "highest order" when only three of the fifty states accord it statutory recognition.

8. See S.C Code Ann. §16-3-730 Law Co-op; Ga. Code Ann. §26-9901.

This paucity of similar authority is hardly surprising since a careful scrutiny of Florida's statute reveals that it serves no legitimate state interest of any kind, let alone one of the highest order.

While the statute purports to serve privacy concerns. its text relates only to *mass media publications* of the name of an alleged rape victim. The identity of an alleged rape victim may be freely disclosed throughout the community to anyone so long as the disclosure does not "cause publication" in "the instruments of mass communication." Liability attaches regardless of whether the identity of the victim is known throughout the community, and despite the fact that Florida sex offense trials must be conducted in public, with anyone who cares to attend free to do so.[9]

These failings are not mere statutory quirks. Neither the statute, nor the implied private action, requires proof of the disclosure of a highly offensive "private fact." It is enough for the implied statutory action that the penal prohibition on a mass media communication has been violated.

In just this way, the implied statutory action stands in sharp contrast to Florida's common law of privacy which requires proof of the disclosure of a fact about one's private life that a reasonable person would find highly offensive. *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 5th DCA), *pet. denied*, 431 So.2d 988 (Fla. 1982), *cert. denied*, 464 U.S. 893 (1983); Restatement (Second) of Torts §652 (1977). Even under such

9. Fla. Stat. §918.16 (1987) does provide for the exclusion of the public "when any person under the age of 16 is testifying concerning any sex offense"; however, even then "newspaper reporters and broadcasters" may not be excluded.

circumstances the common law permits a defense based on newsworthiness or legitimate public concern. 423 So.2d at 427. The implied statutory action allows no such defense.

The statute and its parasitic implied action impose sanctions on the naming of rape victims only when the naming is done in the press. But the singling out of the media for special burdens is an impermissible purpose, not a state interest of the "highest order".

This Court has consistently struck down legislative schemes which single out the media for special liability. In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, supra,* this Court held that a Minnesota statute which imposed a use tax on the cost of paper and ink products consumed in the production of newspapers violates the First Amendment. This Court stated: "[D]ifferential treatment [of the press], unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585. *See also Arkansas Writers' Project v. Ragland, supra; Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (holding that a Louisiana statute which imposed a license tax on the gross receipts from the sale of advertising of newspapers with a weekly circulation of more than 20,000 was an abridgement of the freedom of the press).

Section 794.03, Florida Statutes, singles out the press by prohibiting and punishing only media communications, or disclosure causing them, which reveal information concerning the identity of the victim of a sexual assault. The statute does not prohibit an individual from contacting every person within the State of Florida and

providing those persons with detailed information concerning the victim of a sexual assault. Indeed, the very acts proscribed by the statute are "printing, publishing and broadcasting." The acts within the statutory prohibitions, therefore, clearly must include acts in which only the media engages.

Far from serving a state interest of the highest order, the implied action here serves only to discriminate impermissibly against the press and news sources.

B. The Implied Private Action Is Overbroad, Rather Than Narrowly Tailored To Serve A State Interest Of The Highest Order

The statute and the implied private action have been shown to be underinclusive—inadequate to protect the very privacy interests they purport to serve. They also suffer from the flaw of overinclusiveness. The statute punishes speech even where no privacy interest could exist, for example where the alleged victim desires or consents to the publication, or the publication of her identity is itself clearly newsworthy and warranted. The statute affords no exception for these circumstances. Accordingly, it does not protect society and the individual so much as it supplants them.

The wisdom of case-by-case adjudication of such issues has been repeatedly acknowledged by this Court. *See Globe Newspaper Co. v. Superior Court, supra.* The issue before the *Globe* Court was the constitutionality of a Massachusetts statute which excluded the public from all trial testimony by minor witnesses to sexual abuse. The Court wisely invalidated the *per se* rule of exclusion recognizing that the substantial First Amendment interests at stake required the more sensitive tool

of case-by-case adjudication. The absolutist paternalism of the statute simply could not capture the constitutional complexity of such cases.

The fact that a prosecutrix may lie with impunity behind a veil of anonymity; the fact that racial bigotry may cloud an already unreliable eyewitness identification; or the rarer, but not unheard of, commitment of some victims to full public disclosure of the crime of rape; all of these are factors which militate against *per se* rules against publication of the names of persons accusing others of the crime of rape. That is why many newspapers and electronic media have adopted the policy of publishing the names of alleged rape victims only under exceptional circumstances. The statutory action fails to recognize these extraordinary considerations exist.

The implied action is overbroad in yet a different way. It imposes liability irrespective of the scienter of the publisher. Here publication of the name was both in good faith and in inadvertent variance from the newspaper's policy. The paper was given the records by the police and published its synopsis in good faith reliance upon this official disclosure. But under the implied action, a violation of the penal statute was enough to constitute negligence *per se*, and to justify the punitive damage award.

This holding of the court below is contrary to the clear precedent of this Court in analogous contexts. Where reputational or privacy interests are pitted against the rights of free expression, the Court has insisted on the stringent protection of a *scienter* element. *Hustler Magazine v. Falwell, supra* (to recover compensatory damages for the tort of intentional infliction of emotional distress, plaintiff must prove actual malice); *Gertz v. Robert Welch, Inc., supra*, ("private figure" libel plaintiff must prove "fault" by publisher to recover compensatory damages and actual malice to recover punitive damages); *Time, Inc. v. Hill*, 385 U.S. 374, 387-391 (1967); *New York Times Co. v. Sullivan, supra*. In *Hill*, a statutory "false light" privacy action brought for the wrongful use of the "private figure" plaintiff's name, this Court specifically employed the "actual malice" standard to reverse the New York Court of Appeals, 385 U.S. at 387-88. The irony is obvious: Under the Florida rule, a privacy action based on a truthful publication is afforded less protection than this Court requires in a privacy action grounded in a false publication.[10]

The implied action created by the Florida court imposes strict liability on the press for violation of the statute. B.J.F. was not required to prove that the publisher of *The Florida Star* knowingly or intentionally acquired and disclosed private embarrassing facts about her to injure her. To the contrary, all she was required to prove was that her name was published. For this reason alone the implied action fails to strike the proper balance between First Amendment interests and legitimate privacy concerns.

C. The Implied Action Is Contrary To Cox Broadcasting Corp. v. Cohn

The decision of this Court which is most similar to the case at bar is *Cox Broadcasting Corp. v. Cohn, supra.*

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10. Had this been a libel action, B.J.F. would have been required to prove that the article was false, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that it was published with "fault" and actual malice, *Gertz*, 418 U.S. at 349, and that the writer was motivated by ill will, *Hunt v. Liberty Lobby*, 720 F.2d 631, 650-51 (11th Cir. 1983).

In fact, *Cox* is dispositive of this appeal. The facts in *Cox* bear a close resemblance to the facts of this appeal. First, the statutes at issue were similar. The Georgia law like the Florida statute at issue here, made it a misdemeanor to publish or cause to be published the name "of any female who may have been raped." Indeed, the Court in *Cox* itself noted the statute was similar to the Florida Statute at issue here. *Cox*, 420 U.S. at 471 n.1. Second, in *Cox*, just as in this case, a journalist obtained the name by reviewing official records provided to him by their lawful custodians in the ordinary course of his reporting duties. In *Cox*, the journalist reviewed indictments given him by the clerk of court; in the case at bar, the reporter trainee was provided incident reports by the police officers on duty. In both cases the documents reviewed were public records. Third, in both *Cox* and the case at bar, the names of the alleged victims were published (or broadcast) in mass media. Fourth, in both cases, implied private actions were brought for the violation of the penal statute. Unlike this case, in *Cox* the Georgia Supreme Court ruled that the statute afforded no private right of action, but held that a common law invasion of privacy action by the father of the deceased rape victim did lie for publication of her name. Upon rehearing, Georgia's highest court ruled that the privacy action could not be dismissed on the ground that the name was a matter of public interest because the Georgia statute was "an authoritative declaration of state policy that the name of the rape victim was not a matter of public concern." In the case at bar the Florida court relied exclusively on Section 794.03 to affirm the trial court, concluding the law made the rape victim's name "of a private nature and not to be published as a matter of law."

This Court held unconstitutional Georgia's privacy action for the publication of the name of a rape victim and so stated:

> [T]he State may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

420 U.S. at 491. Obviously, *Cox* would appear to be dispositive of B.J.F.'s case.

B.J.F. on appeal, has offered only one argument to escape the rule of *Cox*. It is an argument never raised in the trial court, and which was ignored by the Florida appellate court. B.J.F. claims that *Cox* is distinguishable because the incident report at issue in this case was not a judicial record open to public inspection. B.J.F. argues that Section 119.07(3)(h), Florida Statutes, exempts rape victims' names from public inspection under the state public records' law. Consequently, B.J.F. argues that this case presents an issue left open in *Cox* by footnote 26.[11]

B.J.F.'s argument has no merit. Aside from the fact that this state law issue was waived in the trial court and ignored by the appellate court, B.J.F.'s argument misunderstands both Section 119.07(3)(h) and *Cox*. The exemption to Florida's public records law is an exemp-

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11. Footnote 26 actually has no relevance here as it is simply a disclaimer that the *Cox* Court was not resolving any access to information cases. B.J.F. has confused the punishment of the press for the publication of lawfully obtained truthful information with the very different issue of the validity of governmental restrictions which limit press access to information. This case involves the former, not the latter.

tion from the otherwise mandatory duty of the records custodian to allow any member of the public to inspect any public record at any time. It is not a prohibition on disclosure. The fact that a public record has been exempted from the public inspection requirement does not mean the custodian may not in his discretion allow inspection of the record. It simply means he has no *mandatory* duty to permit inspection. In this case, the police permitted inspection, and the press in good faith published the item. The exemption does not even purport to alter a document's status as a "public record."[12]

Second, the rule of *Cox* was based as much on the fact that the records were lawfully obtained by the press from their official custodian as the fact that the records were open to public inspection:

> Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. *Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspec-*

12. Under Florida law "public records" are defined as "all documents . . . made or received pursuant to law "by any agency" Section 119.011(1), Florida Statutes (1983). An "agency" is defined as "any state, county, district, authority, or municipal office . . . created or established by law." Section 119.011(2), Florida Statutes (1983). Thus, there is no question the incident reports were "public records" as a matter of law. B.J.F. attempts to cloud the issue on appeal by making reference to Section 119.07(3)(h), Florida Statutes (1983) which exempts public records which reveal the identity of sex offense victims from the mandatory public inspection duty imposed upon records custodians by Section 119.07(1), Florida Statutes (1983). But an exemption from the custodians' mandatory duty to allow inspection of public records does not alter their "public records" status.

> *tion.* Under these circumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.

420 U.S. at 496-497 (emphasis added).

In the case at bar, the reporter trainee was given official public records by their lawful custodian. Once these records were so disclosed, they were placed in the public domain, and *The Florida Star* had the right to publish them. That right may not hinge on the existence of a statutory exemption to a mandatory inspection provision of a state public records law which even the plaintiff did not discover until this case was on appeal.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

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BRIEF

No. 87-329

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IN THE

Supreme Court of the United States

October Term, 1988

THE FLORIDA STAR,

Appellant,

v.

B.J.F.,

Appellee.

On Appeal from the First District Court of Appeal
State of Florida

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ASSOCIATED PRESS, CAPITAL CITIES/ ABC, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL NEWSPAPER ASSOCIATION AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF THE APPELLANT

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No. 87-329

In The
Supreme Court of the United States
October Term, 1988

The Florida Star
Appellant,

v.

B.J.F.
Appellee.

On Appeal from the First District Court of Appeal, State of Florida

Brief of Amici Curiae The Reporters Committee For Freedom of the Press, Associated Press, Capital Cities/ABC, Inc., CBS Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Newspaper Association and Radio-Television News Directors Association In Support of Appellant

STATEMENT OF INTEREST

Amici curiae are eight organizations composed of individual and institutional members of the news media. They are large and small national news organizations that collectively represent a broad spectrum of print and broadcast journalists who gather and disseminate news about crime and the operations of government to the public.

They believe that the decision below has far-reaching implications for journalists around the country, not only in Florida. Permitting states to punish publication of legally obtained information placed in the public domain by government officials will lead to "timidity and self-censorship and . . . suppression of many items . . . that should be made available to the public." Cox Broadcasting v. Cohn, 420 U.S. 469 (1975).

Amici have written permission from both parties to file this brief. Copies of their letters have been filed with the clerk in accordance with U.S. Supreme Court Rule 29.

Amici are:

The Reporters Committee for Freedom of the Press, a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national and

international importance to its member newspapers and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Capital Cities/ABC, Inc. owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers, magazines and books.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcasting networks. NAB's members cover,

produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The National Broadcasting Company, Inc. owns and operates a national television network, and itself and through subsidiaries operates television stations, all of which are engaged in gathering and disseminating news to the public.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For more than a century, a primary concern of

NNA has been to ensure that the news media are able to completely and accurately report on crime in their communities.

The Radio-Television News Directors Association is a professional association of electronic journalists. It has more than 2,500 members who gather, edit and disseminate news and other public affairs information carried by the nation's broadcast stations and cable television systems.

STATEMENT OF THE CASE

The Florida Star, a small weekly newspaper which primarily serves the black community in Jacksonville, Fla., has been held liable for civil damages totaling $97,500 for publishing a rape victim's name obtained from a record made available to the public -- a sheriff's department incident report. The trial court held that the newspaper violated Fla. Stat. §794.03 and that the statute gave rise to a private cause of action for damages.

In pertinent part the statute reads:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree. . . .

Fla. Stat. Ann. §794.03 (West, 1976).

Although the Appellee's identity was publicly released by the sheriff, who rou-

tinely put unredacted copies of such reports in the department press room, the Florida District Court of Appeal ruled that her identity "was of a private nature and not to be published as a matter of law." The Florida Star v. B.J.F., 499 So.2d 883, 884 (Fla. Dist. Ct. App. 1987).

Despite the fact that the constitutionality of §794.03 was squarely before it, the Court of Appeal disposed of the merits of the case in one paragraph without mentioning the First Amendment. It cited only a 1975 state attorney general opinion, Op. Att'y Gen. 075-203 (referred to below as O.A.G. 075-203) and Doe v. Sarasota-Bradenton Florida Television Co. Inc., 436 So.2d 328 (Fla. Dist. Ct. App. 1983).

The appeals court said O.A.G. 075-203 "suggests that Section 794.03, Florida Statutes, be applied to the prosecution of parties publishing nonpublic information.

Accordingly we affirm" the trial court judgment. Florida Star, 499 So.2d at 884.

The court's reliance on Doe, which actually favors the Appellant, appears to focus on dicta. The judge in Doe stated that, under the attorney general's interpretation, the statute might protect citizens when the information that had been published by the news media had not yet been made available for public inspection. Doe, 436 So.2d at 330.

The Florida Supreme Court refused to hear an appeal by The Florida Star and on Oct. 10, 1988, this Court noted probable jurisdiction.

SUMMARY OF THE ARGUMENT

The statute that is the sole basis for the damage award for invasion of Appellee's privacy, Fla. Stat. §794.03, is an unconstitutional restraint on the dissemination of news. This Court has never found a state's interest in protecting personal privacy to be sufficient to outweigh the media's First Amendment right to report on events of public concern, including serious crimes like rape.

Even if the Court were to conclude that the state's interest were sufficiently significant, the statute would fail to pass constitutional muster because it is not narrowly tailored to accomplish that purpose without unduly interfering with the right to publish. As a mandatory secrecy statute, it prohibits publication even when the identity of the victim is known to the public generally and the prohibition would be incapable of protecting her privacy.

Although the state may designate certain information as confidential, it cannot impose criminal penalties or civil liability on a news organization for publishing material the government places in the public domain. If B.J.F. has a cause of action, it is against the sheriff for releasing the information in violation of state law, and not against The Florida Star.

If a state legislature can punish publication of categories of information designated as confidential, although provided by public officials, it can effectively proscribe discussion of a wide range of issues concerning public governance, including serious crime and government corruption.

ARGUMENT

I. Because §794.03 Penalizes Publication Of Accurate Information Given To Reporters By Government Officials, It Is An Unconstitutional Restraint On News Reporting.

A. Restraints On First Amendment Freedoms Are Justifiable Only In Exceptional Circumstances.

In a series of cases beginning in 1975, this Court has repeatedly said that a state cannot punish the news media for publishing accurate information obtained legally from government sources.[1] While acknowledging the strong state interests in protecting individual privacy, public confidence in the judiciary, and rehabilitation of juvenile

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[1] Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) (identity of a rape victim obtained from a court record); Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978) (identity of a judge under investigation by a judicial inquiry board, as well as information about the inquiry); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979) (identity of a juvenile murder suspect).

defendants, the Court has never approved of criminal sanctions or civil damage awards against the news media as a means of furthering such interests.

The protection against restraints on dissemination of news is not absolute. But state action to punish publication of such information "requires the highest form of state interest to sustain its validity," and "seldom can satisfy constitutional standards." Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979).

In Landmark Communications v. Virginia, 435 U.S. 829 (1978), Justice Stewart went even further. Noting Virginia's strong interest in protecting the confidentiality of judicial inquiries, he said:

> If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the

press, unless the need for secrecy is manifestly overwhelming.

Landmark, 435 U.S. at 849 (Stewart, J. concurring in the judgment).

1. The Media's Right To Publish Outweighs Florida's Interest In Protecting Personal Privacy.

Whichever standard is applied, Florida's interest in prohibiting the publication of a rape victim's name does not outweigh the First Amendment right of the news media to publish publicly available information.

In Cox Broadcasting, 420 U.S. at 497, the Court declared Ga. Code Ann. 26-9901 -- which was virtually identical in operation to §794.03 -- unconstitutional on its face. In that case, a reporter covering the criminal trial of several youths accused of raping and murdering a young woman obtained the victim's identity from the indictment, and then broadcast that information. A court

clerk had permitted the reporter to examine the case file during the proceeding.

Following the broadcast, the victim's father sought damages for invasion of his privacy. He claimed that the statute making publication of a rape victim's name a misdemeanor gave him a private right of action. Id. at 474.

This Court held that the First Amendment barred Georgia from making the broadcast the basis for either civil or criminal liability. Cox, 420 U.S. at 497. Writing for the court, Justice White recognized the grave risk to free expression posed by a statute requiring the news media to censor themselves. "[O]nce true information is disclosed in public documents open to public inspection, the press cannot be sanctioned for publishing it," he said. Id. at 496.

He determined that forbidding the news media to publish accurate accounts of publicly available information:

> would make it very difficult for the media to inform citizens about the public business and . . . invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.

Id.

"If there are privacy interests to be protected in judicial proceedings," Justice White wrote, "the States must respond by means which avoid public documentation or other exposure of private information." Id.[2]

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[2] In Cox, the Court noted that three states besides Georgia had similar statutes, including Wis. Stat. Ann. §942.02 (1958), S.C. Code Ann. §16-81 (1962) (which has since been renumbered §16-3-730), and Fla. Stat. Ann. §794.03. Cox., 420 U.S. nl at 471-2. The Wisconsin statute was repealed in 1975, after Cox was decided. The Aiken (S.C.) Standard is challenging the constitutionality of S.C. Code Ann. §16-3-730 in a case currently before the state Supreme Court. Dorman v. Aiken,

Here, as in Cox, the Appellee sought damages for invasion of privacy resulting from an accurate news story identifying her as a rape victim. The sole distinction is that in Cox, the reporter obtained the victim's name from court records and in Florida Star, the reporter copied the victim's name from a police report which was publicly released by the sheriff.

In Landmark, 435 U.S. 829 (1978), the Court ruled that a state could not prosecute a newspaper under a criminal statute for publishing leaked information about a judi-

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[2] Continued
87-CP-02-2109 (2nd Cir. 1988), appeal docketed, No. 88-656 (S.C. Sup. Ct. Apr. 28, 1988). In that case, the newspaper identified a woman in a story which was based on a police department public statement that she had been "assaulted," and on interviews by reporters. After publication, the newspaper learned that the assault had, in fact, been a sexual assault. The woman sued for violation of the statute, invasion of privacy and infliction of emotional distress. The Standard appealed from the denial of a motion for summary judgment.

cial review commission investigation because the statute operated to coerce the news media into keeping information from the public. The First Amendment protected the newspaper even though the commission's activities were secret under the Virginia Constitution and the newspaper's source apparently breached a statutory duty of confidentiality, this Court concluded.[3]

Although recognizing that Virginia had a substantial interest in protecting confidential judicial investigations, Chief Justice Burger wrote:

> [The] publication . . . lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.

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[3] The statute made it a misdemeanor for "any person (to divulge confidential information) to anyone except the Commission." Va. Code §2.1-37.13 (1973). Landmark, 435 U.S. at 831.

Landmark, 435 U.S. at 838.

In Smith, 443 U.S. 97 (1978), this Court ruled that a statute similar to §794.03 was unconstitutional. West Virginia made it a misdemeanor for newspapers to publish the names of juvenile offenders without obtaining prior written approval from the juvenile court. W.Va. Code §49-7-3, §47-7-20 (1976). Id. at 98.

News organizations in Charleston, W.Va., heard about a fatal shooting at a junior high school from police radio reports. Reporters sent to the scene learned the identity of the juvenile suspect in the case from interviews with witnesses, the police and an assistant prosecutor at the school. The police and prosecutor were under a statutory duty not to disclose the suspect's identity. W.Va. Code §49-7-1 (1986).

In its initial story about the homicide, The Daily Mail omitted the juvenile's name because of the statutory prohibition. However, after another newspaper and three radio stations identified the suspect, The Daily Mail published the juvenile's name. Smith, 443 U.S. at 99-100.

West Virginia argued that the state had a significant interest in protecting the anonymity of the juvenile. It asserted that confidentiality would further the juvenile's rehabilitation because publication of the name might encourage further antisocial conduct, cause the juvenile to lose future employment or suffer other consequences. Id. at 101.

Following an analysis of Cox and Landmark, this Court declared the statute

unconstitutional.[4] Those decisions, the Court said:

> suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information.

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[4] The Court also relied on Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), in which it struck down a gag order issued by a Juvenile Court judge prohibiting publication of the name or photograph of a juvenile suspect in a homicide case. Reporters had obtained the information while attending a detention hearing for the youth. The Oklahoma Supreme Court had concluded that the order was constitutional because juvenile proceedings were secret under state law unless the presiding judge specifically opened them to the public. This Court said, however, "Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. . . . There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval." Id. at 311.

Smith, at 443 U.S. at 103 (emphasis added).

When the Florida attorney general issued O.A.G. 075-203 four months after this Court decided Cox, he could not have foreseen these later decisions. According to the attorney general:

> In the event such nonpublic information is obtained and printed, published, or broadcast prior to open, public judicial proceedings, the holding of Cox does not purport to prohibit the state from prosecuting those individuals who have violated §794.03.

He also stated that:

> The fact that the information might be disclosed orally as opposed to allowing inspection or examination of the records as hereinabove defined, regardless of physical form or characteristics, is of no import insofar as the prohibitions contained within ss. 119.07(2)(b) and 794.03, F.S., are concerned. To exempt oral communications from the purview of this prohibition would allow a circumvention and frustration of these provisions by indirect means.

O.A.G. 075-203.

But the constitutional flaws in the attorney general's reasoning should have been readily apparent to the District Court

of Appeal which affirmed the judgment for B.J.F. In Landmark and Smith, this Court ruled that the media could not be punished for publishing non-judicial government information leaked by an individual under a duty to maintain the confidentiality of the material. This is so whether the information is made available in a government document or orally when the media "rel[y] upon routine newspaper reporting techniques" -- including interviewing officials -- to obtain information which the government may not lawfully disclose. Smith, 443 U.S. at 103-104.

In Cox, Landmark and Smith this Court focused mainly on whether the government had a compelling interest in keeping a certain type of information secret once it had been placed in the public domain. The uniform conclusion was that, absent extraordinary circumstances, the government's interest in

protecting the identities of rape victims and juveniles involved with the justice system, or the integrity of governmental inquiries, is not sufficient to support statutes punishing publication.

2. The Statute Cannot Protect Florida's Interest.

Even if this Court were to find that protecting the identity of a rape victim was an interest of the highest form, §794.03 would be unconstitutional because victims' privacy can be protected adequately without restraining news reporting. For example, the sheriff could have deleted B.J.F.'s name from the incident report before placing it in the press room.

Furthermore, §794.03 prohibits publication of a rape victim's name regardless of whether the identity is obtained from publicly available records, common knowledge or

from the victim herself.[5] The statute is not capable of protecting the interest asserted in this case -- the victim's privacy -- under all circumstances, nor is it narrowly tailored to accomplish this purpose.

In striking down a Massachusetts statute excluding the news media and public from any criminal trial during the testimony of a sexual assault victim who is a juvenile, this Court ruled that mandatory closure statutes are, by definition, not narrowly tailored to protect a compelling state interest. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

> We agree [that] . . . safe-guarding the physical and psychological well-being of a minor is a compelling [interest]. But as compelling as that

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[5] For example, a news organization could be punished under §794.03 if it were to publish an interview with an identified rape victim who was seeking publicity for a group in which rape victims could meet to discuss their experiences and obtain psychological support from each other.

> interest is, it does not justify a mandatory-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.

Globe, 457 U.S. at 607-608.

It would be illogical to argue that an adult rape victim is entitled to blanket protection when a juvenile victim is not. Similarly, it is illogical to argue that publication of a victim's name is more damaging in a story derived from a police record than an account based on a judicial record, which is privileged under Cox. Justice Brennan's reasoning in Globe is equally applicable to the blanket prohibition against publication of a rape victim's name imposed by §794.03.

The Florida statute prohibits publication even when a sexual assault victim neither seeks such a restraint nor would be injured by publication. For example, the Florida media might have been convicted under §794.03 for identifying U.S. Sen. Paula Hawkins in stories about her public revelation in April 1984 that she had been sexually molested as a child. New York Times, April 27, 1984, Late City Final Edition, pg. 1, col. 4.[6] Moreover, had the assault on B.J.F. ended in homicide, like the crime in Cox, The Florida Star would have been guilty even though no injury to her privacy could have resulted.

If the state were to contend, as Massachusetts did, that the prohibition is necessary to encourage rape victims to report the crimes, §794.03 could not meet constitutional requirements. "Not only is the claim speculative in empirical terms, but it is

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[6] In O.A.G. 075-203, the attorney general discusses only a prohibition against publishing a rape victim's identity obtained from government records prior to open court proceedings. The statute contains no such limitation as to the source of the information.

also open to serious question as a matter of logic and common sense." Globe, 457 U.S. at 609-610.

There are strong policy reasons for allowing publication of rape victims' names without penalty. For example, secrecy and misinformation perpetuate the stigmatization of rape victims and, in fact, may discourage some rape victims from coming forward. Conceivably, if victims of sexual assaults were treated like victims of other types of crimes, they might be more willing to report the crimes.[7]

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[7] Last April, a Brattleboro, Vt., woman was brutally assaulted and raped. Two days later, police issued a press release about the incident but called it simply an "assault." When reporters questioned police about the crime they learned more details and, on April 28, the victim told her story in an unsigned letter to the editor published under a banner headline on the front page of the Brattleboro Reformer. She said, "I am not embarrassed about the 'extremely personal nature of the crime.' I am enraged by the same." In a story about a "March to help stop violence" a week later

Finally, even if the statute were applied only to situations described in O.A.G. 075-203 -- when the media obtain a victim's identity from a government source and publish prior to open judicial proceedings -- it would be unconstitutional. Under such circumstances the media would be free to publish a victim's identity gained by ordinary reporting techniques such as interviews with witnesses. Therefore, the statute would be incapable of protecting any state interest.

In a 1982 case, the Florida Supreme Court applied the reasoning of Landmark,

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[7] Continued
in Brattleboro, the newspaper identified the victim with her permission. A copy of the published version of the woman's letter is in the appendix to this brief at 1a-3a. A detailed article about coverage of the events in Brattleboro, including interviews with the woman, the Reformer's editor and others, published in Editor & Publisher, July 2, 1988, is at 4a-6a.

Smith and Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) in declaring a similar statute, Fla. Stat. §934.091, unconstitutional. That law made it a felony to publish or broadcast:

> the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications pursuant to s. 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

Gardner v. The Bradenton Herald Inc., 413 So.2d 10 (Fla. 1982).

In that case, the newspaper obtained the identities of people who had been wiretapped and sought a declaratory judgment that the statutory prohibition was unconstitutional. The trial court ruled in the newspaper's favor.

The Florida Supreme Court stated:

> [The statute] assert[ed] through the means of criminal sanctions that the total confidentiality of a governmental activity is a legitimate state interest that must be preserved even at the cost of restraint upon the press. . . . [and]

> that absent criminal sanctions the objectives of the statutory scheme would be seriously undermined.

Gardner, 413 So.2d at 12.

Nonetheless, the court found that §934.091 was not a "narrowly drawn statute closely tailored to interests such as protecting national security," undercover officers, ongoing investigations, kidnap victims' lives, or the right to a fair trial. Id. at 12. Section §934.091, like the Massachusetts statute in Globe and §794.03, was a mandatory secrecy statute.

In Florida Star, the Court of Appeal disregarded not only this Court's decisions in Cox and its progeny, but also the precedent of its own Supreme Court when it refused to acknowledge the First Amendment issue before it. Instead, it erroneously relied on dicta in Doe v. Sarasota-Bradenton, 436 So.2d 328 (Fla. Dist. Ct. App. 1983), which, in fact, held

that broadcast of a rape victim's picture and name was not prohibited by §794.03 and that her invasion of privacy claim was invalid because the victim had testified in open court. The court below also relied on O.A.G. 075-203, which misconstrued Cox, and has been superseded by Landmark, Smith and Globe.

Florida's interest in protecting a rape victim's identity is not sufficient to support a blanket prohibition on publication of publicly available information, or post publication punishment for accurately reporting such information.

B. A State May Designate Information As Confidential, But May Not Punish Publication Once Such Information Is In The Public Domain.

As Justice White stated, "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or

other exposure of private information." Cox, 420 U.S. at 496. Florida has designated the identities of rape victims confidential and, according to O.A.G. 075-203, custodians of government records containing such information are under a duty not to disclose them.

But the state may not, merely by making information confidential, prevent or punish its publication. Once such information is placed into the public domain, as the sheriff placed a report containing B.J.F.'s name in the department press room, the news media cannot be sanctioned for its publication.

This Court said in Cox:

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.

Cox, 420 U.S. at 496.[8]

The sheriff's report in Florida Star was not an official court record, but neither was the information published in Landmark and Smith. Like that information, it contained governmentally generated material which officials had an affirmative duty to keep secret. Nevertheless, the sheriff put a copy of the report in the press room for public inspection. This action placed the record into the public domain. In doing so, the sheriff's department apparently concluded the news media would censor themselves.

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[8] Similarly, a Maine Superior Court ruled that a newspaper which did nothing illegal to obtain court documents, sealed under state law, could not be enjoined from publishing the information. It concluded that an injunction barring news reports concerning a juvenile accused of arson would violate the First Amendment even though the information should not have been disclosed. State v. Yard, No. CV-83-897, slip op. at 4 (Me. Super. Ct. 1983).

This is exactly what this Court, in Cox, sought to prevent.

In this case, the sheriff could have protected B.J.F.'s privacy by deleting her name from the report before placing it in the press room, but did not do so. In fact, as the attorney general noted:

> A police chief who is the custodian of any such records containing such identifying information is obligated and charged with the duty by operation of law not to allow or permit public inspection or examination of such records.

O.A.G. 075-203.

The Jacksonville Sheriff's Department had a duty to delete B.J.F.'s name from the incident report before placing it in the press room. By making the complete report available to reporters, the sheriff attempted to shift his statutory duty to protect B.J.F.'s privacy to the news media. He could not do so. Accordingly, any private cause of action for invasion of privacy lies against the sheriff, as custodian of the

record, and not The Florida Star for publication.

The custodian, and not the news media, has been held liable for invasion of privacy where medical records of an individual arrested in a "sting" operation were released to the news media by the administrator of a drug treatment program. Logan v. District of Columbia, 447 F.Supp 1328 (1978). Because the information was freely disclosed by the administrator and no illicit means were used by the news media to obtain the data, the court held that "if anyone should be liable for an invasion of privacy in this case, it should be the official who disclosed the confidential information" to the newspaper. Id. at 1333.

In a recent case which raised similar issues, Boettger v. Loverro, 502 A.2d 1310 (Pa. Super. 1986), argued, No. 31-E.D. (Pa.

Nov. 10, 1987),[9] a court clerk in Pennsylvania failed to impound a sealed wiretap transcript, inadvertently leaving it in a public file. A reporter for the Easton Express read the transcript, which concerned an illegal betting operation, and the newspaper published an article quoting the transcript. Subsequently, the individual who was the target of the wiretap sued the reporter and the Easton Express for invasion of privacy and unlawful disclosure. Id. at 1311-1312.

Although Pennsylvania law made it illegal to disclose or use information from a sealed wiretap transcript, the court, citing Cox, Landmark and Smith, held that the newspaper's action did not provide the basis for an invasion of privacy action against it.

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[9] The state Supreme Court had not decided this case as of Nov. 29, 1988.

Id. at 1315. The court found that the state wiretap act contained an implied exemption for publication of lawfully obtained information of legitimate public concern, and that the information had been obtained from court records accessible to the public. The court held that it was the clerk, not the newspaper, who had violated the wiretap act by making the transcript available for public inspection. Boettger, 502 A.2d at 1312.

In the instant case, had the Jacksonville sheriff not allowed The Florida Star's reporter to copy the information about the Appellee, her name would not have been available for publication. Allowing the news media access to information, and then punishing it for publishing the information is inconsistent with Cox, its progeny and the First Amendment guarantee of freedom of the press.

II. Affirmance Of The Court Of Appeal Decision Will Lead To Censorship On A Broad Range Of Issues Of Great Importance To The Public.

The significance of this case goes far beyond balancing a rape victim's common law privacy interest against the media's constitutional right to publish news. Rather, it concerns a state's ability to designate certain types of information as nonpublic and then punish publication after the information is released into the public domain. This issue has arisen in several jurisdictions recently, but one need not look outside Florida to see the chilling effect it will have on discussion of important public issues.

In Cape Publications, Inc., v. Hitchner, 514 So.2d 1136 (Fla. Dist. Ct. App. 1987), argued, Fla. Sup. Ct. (No. 87-277)(Aug. 30, 1988), a newspaper has been held liable for publication of accurate information about a

child abuse case obtained from the prosecutor.

In that case, after the child's parents were acquitted of aggravated child abuse, a Today newspaper reporter reviewed the court clerk's file, and interviewed the prosecutor and one of the plaintiffs. The prosecutor allowed the reporter to examine his case file containing information designated confidential under state law.

Today published a story based on this information in December 1981, and the parents subsequently sued for invasion of privacy by publication of private facts.[10]

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[10] B.J.F. could have brought a common law invasion of privacy action under Florida law, but chose not to do so. By failing to bring a common law claim, the Appellee relies solely on §794.03 and the actions of the newspaper as the basis for her recovery. A finding by this court that §794.03 is unconstitutional will effectively vacate the jury's award of damages.

In January 1987, a Brevard County Circuit Court judge ruled that the newspaper was liable for invasion of privacy because some information in the prosecutor's file was confidential under Fla. Code §827.07(15).[11]

On appeal by Today, the District Court of Appeal ruled that the statute "does not infringe upon the freedom of press and publication but merely establishes the privacy

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[11] Florida Statute §827.07(15), (18) (1979) at that time stated:

(15) Confidentiality of Reports and Records

(a) In order to protect the rights of the child and his parents or other persons responsible for the child's welfare, all records concerning reports of child abuse or neglect, including reports made to the abuse registry and to local offices of the department and all records generated as a result of such reports, shall be confidential and exempt from the provisions of Sec. 119.07(1), and shall not be disclosed except as specifically authorized by this section.

(18) Penalties

(b) Any person who knowingly and willfully makes public or discloses any

of certain facts by prohibiting their disclosure." Cape Publications, 514 So.2d at 1138-9.

It is significant that the state attorney in Miami supported Cape Publications' petition for review by the Florida Supreme Court. She stated:

> A limitation of the public's access to information concerning child abuse could undermine the public's confidence in its officials, who are charged with executing our criminal laws. (footnote omitted) Of even greater significance, it could potentially result in a decrease in the detection of child abuse. . . . Any curtailment of the public's access to information about this most grave problem has serious consequences. . . .

Jurisdictional Brief of the State Attorney of the Eleventh Judicial Circuit of Florida

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11 Continued
confidential information contained in the abuse registry or in the records of any child abuse or neglect case, except as provided in this section, is guilty of a misdemeanor of the second degree, punishable as provided in Sections 775.082, 775.083, or 775.084.

as Amicus Curiae, at 4. As the state attorney recognized, a statute designating information nonpublic, which is the sole basis for civilly punishing publication of crime information, restrains the dissemination of news. It does not merely establish the privacy of facts and prohibit disclosure.

The risk of criminal punishment and civil liability for publication is not limited to situations in which the media may reveal or have revealed information about rape victims and child abuse defendants.

News about government corruption obtained from leaked official reports has also resulted in at least the threat of prosecution of a media organization within the last year. In mid-1987, the Lufkin (Texas) Daily News published information concerning an investigation of misfeasance at the city fire department garage. The newspaper's account

was based on documents presented by investigators to the Lufkin City Commission that were leaked by a confidential source.[12]

In response, the city attorney stated that the newspaper had violated the Texas Open Records Act. According to the city attorney, publication hindered the investigation and exposed the city to lawsuits by witnesses who had provided information to detectives in confidence. He claimed that the publication was a misdemeanor, but he never filed formal charges against the newspaper.

Incidents of official misfeasance are "without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." Cox,

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12 The Lufkin Daily News, Tuesday, Sept. 1, 1987, pg. 1, see appendix, 7a-8a; Wednesday, Sept. 2, 1987, pg. 1, see appendix 9a-10a.

420 U.S. at 492. If prosecutions were permitted under the theory advanced by the Lufkin city attorney, it would be "very difficult for the media to inform citizens about the public business and yet stay within the law." Id. at 496.

For example, because a judge in Indiana threatened a reporter with contempt in November 1982, the Greensburg Daily News did not publish a story stating that a deputy sheriff was about to be charged with arson. At the time, Ind. Code Ann. §35-34-1-1(d) (Burns Cum. Supp. 1984) stated that a judge could seal an indictment or criminal information and that "no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court." The penalty for violation was a finding of contempt.

In an action by the newspaper for a declaratory judgment, the U.S. District Court in Indiana upheld the statute. But the Seventh Circuit U.S. Court of Appeals declared the statute unconstitutional. While acknowledging the state's interest in capturing criminals, the panel said, "we do not think it is sufficiently compelling to justify the prohibition of publication by any person, including members of the press, of the contents of a sealed document, mandated by §35-34-1-1(d)." Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1223 (1984) (emphasis in original).

If this court were to rule that a state may penalize the news media for publishing information in the public domain merely on the basis of a statute designating that information confidential, the result in a case like Worrell might very well be different.

Amici have not conducted an exhaustive search for state statutes which specifically punish the news media for publishing government information in the public domain or which might be invoked as the bases for private causes of action. However, by way of example, Alaska statute, §47.10.090(b) (1984), makes it a misdemeanor, punishable by fine or imprisonment, to publish the name or picture of a minor under the jurisdiction of the Juvenile Court unless authorized by order of the court. Although this is the same type of statute as the one struck down in Smith, it remains on the books.

These are but a few of the situations in which the media might be prosecuted or subjected to civil liability if this Court were to adopt the position of the Florida Court of Appeal.

CONCLUSION

For the above reasons, Amici urge this Court to declare Fla. Stat. §794.03 an unconstitutional restraint on publication of information obtained legally from the government by the news media. We further request that the judgment and award against The Florida Star be vacated.

Respectfully submitted,

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December 2, 1988

Counsel for Amici gratefully acknowledge the assistance of Carole Paling, a Reporters Committee legal fellow who has passed the Massachusetts bar exam but is not yet admitted to the bar, in preparing this brief.

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Sunny, cool
High 54, low 34
Bar. 29.66, steady

Stocks ☐ page 8
Dow Jones: down 8.79

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Rape victim: 'Enraged,' not 'embarrassed'

An issue of public debate

The author of the letter to The Reformer on this page was brutally raped a week ago last Saturday morning. In a lengthy talk Tuesday at The Reformer, she said she wanted "something good" to come out of her nightmare. This statement, describing her experience, offers lessons to be learned, and raises major issues of public policy in how the police and the press treat such crimes.

This victim particularly objected to the way Brattleboro police communicated with the media and the public about the crime. For one thing, the public was not informed about the assault — by what she describes so vividly as the stranger in the night, who she believes has attacked women before and will do so again — until 48 hours after the event. Police Chief Bruce Campbell then defined the crime as an "assault," not a rape, because of what he said was the "extreme personal nature" of the crime. He said further, "This person has suffered enough already."

Publicizing the fact that that person was sexually violated would serve no good whatsoever."

The victim thinks that policy was a mistake.

Because of the major public policy issues raised in the letter, both the victim and The Reformer agreed it should be published on Page One, rather than in the Letter Box, in order to contribute to public debate about a subject that can not, and should not, be hidden, and will have to be dealt with now and in the future.

The issue of whether the woman's name should have been made public by the police is not an issue, and never was. Chief Campbell, rightly, never would release the name of a victim of an assault, nor should the media ever ask him to. We are not using her name here either. The issue is what happened to her, not who she is. It is clear, however, that she is a brave and courageous woman.

— Norman Runnion

To the Editor:

I am the victim of the recently reported sexual assault in Brattleboro. The assaults were very serious. During the beating before the assault, I struggled for my life. I fought with every ounce of my strength to get away from this person. From the moment this man ordered my home my thought was that he was there to kill me.

During the sexual assault that followed the initial struggle my thoughts were:

1) keep breathing regularly and calm yourself;

2) stay conscious;

3) build physical and mental strength to plot escape.

I had felt two gaping holes in my head and knew I was bleeding profusely. I am a wimp when dealing with blood and particularly with head injuries, so it was essential for me to "get myself together."

The sexual assault lasted about three and one-half hours. He was apparently frightened away by the arrival of a friend's vehicle next door, leaving some of his "tools" at the scene. I know I do not know this man. He has probably "observed" me for some amount of time.

I called the police within 30 seconds of this man's leaving. My first words to the dispatcher were, "Send the police and Rescue to 'address.' I have been raped and beaten."

I found it ironical that those words were the headline in the April 11 article in the Keene Sentinel. Those are the facts of the event. Fortunately a reporter for that newspaper queried an acquaintance for information regarding the "assault" in Brattleboro. Her gut reaction was, "Assault, what assault? You mean the rape?" This woman has been my "guiding light" throughout all of this ordeal.

I am thrilled to be alive and happy to have what are apparently no permanent injuries. However, my first prescription from one of the three doctors who treated me was: 1) gonorrhea culture in two weeks, 2) syphilis test in six weeks, 3) AIDS test in 12 weeks, and 4) pregnancy test in 10-14 days. That "Rx" brings the reality of the potential results of the sexual assault home to me. The other wounds are healing quickly.

My first concern is to get this individual off the streets. Although I am not a student of rape, the experts with whom I have conversed tell me it is only a matter of time before this man's trigger is cocked a second time. And how many other times and places has this man in his 40s executed similar maneuvers?

My concerns for privacy as a victim are only that the assaulter may come back to "wipe out" his only witness. But he knows where I am, should that be his interest; I am not difficult to find. I am not embarrassed about the "extremely personal nature of the crime." I am enraged by the same.

There are many friends and acquaintances who know. As often happens during tragedies of this type, my heart has grown stronger because of the concern and support provided by these individuals. Many have gone out of their way to be supportive. All of this support has strengthened my convictions and reasons for living in a community of this size and friendliness.

For me it has been helpful to discuss these events. I speak and write as one victim. Beyond the support received, I have also gathered valuable evidence leading to potential suspects.

My opinions regarding publicity of this event follow.

Members of the public have a right to know every detail of an event such as that which has happened to me for two reasons: 1) to help apprehend the perpetrator, 2) to help protect themselves.

There is always much misinformation printed in the press. Part of this appears to be from no apparent policy at the police station to centralize information and make conscious efforts to disseminate facts that will help locate the offender and help individuals protect themselves. One person should be the contact point for the press at the police station. The community needs to know the type of criminal activity being carried on here, and my opinion is that is best done through focused discussion and conscious, thoughtful press releases.

I think it is perfectly appropriate and the only responsible action for the police and media to work together to release information that a serious assault and rape has occurred in Brattleboro. The victim fought for her life and was unable to escape until he left.

The community does not need to know who the victim is or even in my opinion the exact street location of the crime. The facts regarding my age and strength should alert people to the fact that I am not a "vulnerable elderly woman" in circumstances similar to Mrs. Benson (who died in the Harbor Building) in December.

Last November/December I had dreams of being murdered. I spoke to many other women who were living in a state of terror because of the murders, assaults, attempted assaults occurring during that time period. I worried particularly about elderly women or handicapped individuals because I am strong and healthy and I was so frightened that I dreamed of being murdered.

Every individual with whom I have had contact has been totally friendly, supportive, concerned about my privacy and enraged that this event should happen to anyone in Brattleboro or anywhere else. Every Brattleboro police officer, Rescue staff and BMH employee has been helpful, courteous, kind, considerate, and professional. The volunteer from the Women's Crisis Center deserves special accolades for her presence and resulting experience.

If Chief Campbell really has concerns for the victim he should talk to the victim. Each victim's concerns may differ. My primary concerns as a victim are that no person should experience what happened to me. I have done and will continue to do everything within my power to assist in apprehending this individual. I have never met Chief Campbell. Let us work together to continue to make for ourselves and our children this community an enriching, healthy place within which to live, work, and play.

With sincere appreciation for every person's efforts in this regard.

Police single out suspects in rape

By THERESA M. MAGGIO

Brattleboro Police Chief Bruce Campbell said Tuesday that two suspects have been singled out in connection with the three-hour-long sexual assault and beating of a 30-year-old Brattleboro woman a week ago Saturday.

According to information provided to the Reformer by the victim, one of the suspects is a man in his 40s who she said apparently has been working at a downtown business. The victim told the Reformer Tuesday this person may have been watching her for weeks, and would have seen her every morning as she set out for work.

Detective Sgt. Steven Rowell, who along with Lt. Frank LaFlam is assigned to the investigation, said police are attempting to get a photograph of this suspect to show the rape victim.

Rowell also said to the victim that one of the suspects has left town, she told the Reformer.

"There is an active investigation going on and the subject's photograph and location are being sought," Rowell said.

Chief Campbell would not say whether the suspects were still in town because a statement either way could hamper the investigation, he said.

The victim also told the Reformer her attacker had left behind a pair of gloves, laced with a chemical. Rowell said police dogs were not called in to pick up a scent from these items because, he said, "If it indeed is a chemical, it would probably destroy the dog's nose."

Campbell said that the press release calling the incident an "assault," without mentioning that it was a rape was not released until Monday — 48 hours after the attack — because both the investigating police officers thought the other one already had written it.

"I worked until one o'clock and thought Lt. LaFlam was dealing with the peripheral issues," Rowell said. "On Monday we both realized it hadn't been done."

The victim told the Reformer she believed her attacker would do the same thing again. Chief Campbell said, "That is an opinion of hers, but there is no factual basis to support it. This is not to say she is not correct."

In her letter to the editor which appears elsewhere on this page, the victim said she had never met Chief Campbell, who has said he is protecting her privacy. She objects to his policy.

The chief said he hadn't talked to the victim because she went out of town after the incident, and because any interview would have been redundant. "I had two very

See POLICE, Page 12

Dukakis wins in N.Y.

By DAVID ESPO

NEW YORK (AP) — Michael Dukakis swept to a convincing victory over Jesse Jackson in the New York primary Tuesday night and seized control over the turbulent race for the Democratic presidential nomination.

"I love New York," the Massachusetts governor crooned in a victory statement prepared for a hotel rally in midtown Manhattan. "Friends, if we can make it here we can make it anywhere."

Sen. Albert Gore Jr. finished a weak third and seemed likely to quit the race on Thursday. He congratulated Dukakis and said the Democratic party was "going to be unified" for the fall campaign.

Vice President George Bush won the Republican primary, with no serious opposition in New York or elsewhere. He told reporters he thought Dukakis was a "good bet" to go on and capture the Democratic nomination and said he was eager to join the battle with whatever opponent the Democrats gave him.

With 76 percent of the precincts reporting, the Democratic vote looked this way:

Dukakis had 871,494 or 58 percent.
Jackson had 411,230 or 33 percent.
Gore had 138,494 or 11 percent.

"I think we have a nominee," said Lynn Cutler, deputy chair of the Democratic National Committee.

See DUKAKIS, Page 12

AP

DUKAKIS GETS A HAND — Gov. Michael Dukakis greets a New York City subway rider Tuesday during a last minute campaign stop. Dukakis swept to victory in the New York primary with over 50 percent of the vote in the three-man race.

Dukakis takes slight lead in Vt.

By DANICA KIRKA

MONTPELIER (AP) — Michael Dukakis, the long favorite, held a slight lead over Jesse Jackson in Vermont's Democratic presidential caucuses Tuesday night.

Jackson held the lead through much of the night's counting, beating Dukakis in the state's largest city and many of its smallest, most rural communities.

The delegates elected Tuesday night will attend next month's state convention, at which time 14 of Vermont's 19 delegates to the national convention will be chosen. The remaining five spots belong to Gov. Madeleine Kunin, a Dukakis backer, and four state party officials.

With 87 percent of the 1,300 delegates reported, Jesse Jackson had 515 delegates, or 46 percent, while Dukakis had 511 delegates, or 45 percent. Al Gore had four delegates, while 23 uncommitted delegates had been elected.

"If (Jackson) can get 50 percent of the white vote in a state that is practically all white, it is making a statement that people aren't seeing him as the black candidate. They're seeing him as the people's candidate," said Blum.

A Jackson win in the caucuses would be a disappointment for the Dukakis campaign, which has most every prominent Democrat in the state behind it, including Kunin, Sen. Patrick Leahy, D-Vt., Lt. Gov. Howard Dean and House Speaker Ralph Wright.

In the state's largest city of Burlington, Jackson won 60 percent of the delegates at a caucus highlighted by the appearance of Burlington Mayor Bernard Sanders, a socialist who has long fought the Democrats.

Sanders nominated Jackson at the Burlington caucus, while Kunin nominated Dukakis.

"I have no apologies to make to anybody," Sanders said before the caucus, responding to Democrats who opposed his appearance at their caucus.

Kunin said the Jackson win in Burlington and his strong showing

See VERMONT, Page 12

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Thank you for taking part in days of remembrance at the Latchis both this week. Your messages left, including phone No. at 254-8850 will be responded to within 24 hours.
Doris Diamondstone
at PARAGRAPHICS

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Rape victim: 'Enraged,' not 'embarrassed'

To the Editor:

I am the victim of the recently reported sexual assault in Brattleboro. The assaults were very serious. During the beating before the assault, I struggled for my life. I fought with every ounce of my strength to get away from this person. From the moment this man entered my home my thought was that he was there to kill me.

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1) keep breathing regularly and calm yourself;

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I called the police within 30 seconds of this man's leaving. My first words to the dispatcher were, "Send the police and Rescue to 'address,' I have been raped and beaten."

I found it ironical that those words were the headline in the April 11 article in the Keene Sentinel. Those are the facts of the event. Fortunately a reporter for that newspaper queried an acquaintance for information regarding the "assault" in Brattleboro. Her gut reaction was, "Assault, what assault? You mean the rape?" This woman has been my "guiding light" throughout all of this ordeal.

I am thrilled to be alive and happy to have what are apparently no permanent injuries. However, my first prescription from one of the three doctors who treated me was: 1) gonorrhea culture in two weeks, 2) syphilis test in six weeks, 3) AIDS test in 12 weeks, and 4) pregnancy test in 10-14 days. That "Rx" brings the reality of the potential results of the sexual assault home to me. The other wounds are healing quickly.

My first concern is to get this individual off the streets. Although I am not a student of rape, the experts with whom I have conversed tell me it is only a matter of time before this man's trigger is cocked a second time. And how many other times and places has this man in his 40s executed similar maneuvers?

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My opinions regarding publicity of this event follow.

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There is always much misinformation printed in the press. Part of this appears to be from no apparent policy at the police station to centralize information and make conscious efforts to disseminate facts that will help locate the offender and help individuals protect themselves. One person should be the contact point for the press at the police station. The community needs to know the type of criminal activity being carried on here, and my opinion is that is best done through focused discussion and conscious, thoughtful press releases.

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The community does not need to know who the victim is or even in my opinion the exact street location of the crime. The facts regarding my age and strength should alert people to the fact that I am not a "vulnerable elderly woman" in circumstances similar to Mrs. Benson (who died in the Barber Building) in December.

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If Chief Campbell really has concerns for the victim, he should talk to the victim. Each victim's concerns may differ. My primary concerns as a victim are that no person should experience what happened to me. I have done and will continue to do everything within my power to assist in apprehending this individual. I have never met Chief Campbell. Let us work together to continue to make for ourselves and our children this community an enriching, healthy place within which to live, work, and play.

Witn sincere appreciation for every person's efforts in this regard.

Brattleboro (Vt.) Reformer
April 20, 1988 p.1

An issue of public debate

The author of the letter to The Reformer on this page was brutally raped a week ago last Saturday morning. In a lengthy talk Tuesday at The Reformer, she said she wanted "something good" to come out of her nightmare. This statement, describing her experience, offers lessons to be learned, and raises major issues of public policy in how the police and the press treat such crimes.

This victim particularly objected to the way Brattleboro police communicated with the media and the public about the crime. For one thing, the public was not informed about the assault — by what she describes so vividly as the stranger in the night, who she believes has attacked women before and will do so again — until 48 hours after the event. Police Chief Bruce Campbell then defined the crime as an "assault," not a rape, because of what he said was the "extreme personal nature" of the crime. He said further, "This person has suffered enough already. Publicizing the fact that that person was sexually violated would serve no good whatsoever."

The victim thinks that policy was a mistake.

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The issue of whether the woman's name should have been made public by the police is not an issue, and never was. Chief Campbell, rightly, never would release the name of a victim of an assault, nor should the media ever ask him to. We are not using her name here either. The issue is what happened to her, not who she is. It is clear, however, that she is a brave and courageous woman.

— Norman Runnion

Unsigned letter runs as lead story

Vermont newspaper crusades against 'Scarlet Letter' by running rape victim's letter on the front page

By Steven K-Brooks

The letters page of the *Brattleboro* (Vt.) *Reformer* is an animated, often provocative community forum.

Recently the Reformer published an unsigned letter, by a woman who had been raped, as the front-page lead story with the headline, "Rape victim: 'Enraged,' not 'embarrassed.' "

"It's the first time to my knowledge that anyone has run an unsigned letter on Page One with a six-column headline," said Reformer editor Norman Runnion. "To do so, I had to run an explanation as well."

The explanation, alongside the letter, was titled, "An issue of public debate." A news story about the police investigation appeared on the other side. In his statement Runnion said the woman's letter "offers lessons to be learned, and raises major issues of policy in how the police and the press treat such crimes."

The first report of the crime in the Reformer, based on a police press release, was a short item, "Assault suspect sought." The story gave the location, the woman's age, and requested information from anyone who had witnessed anything suspicious. It referred to what was actually a brutal rape as "a reported assault." Due to a police error, the press release was issued 48 hours after the crime.

Brattleboro 75 Reformer

Rape victim: 'Enraged,' not 'embarrassed'

An issue of public debate

Police single out suspects in rape

Dukakis wins in N.Y.

Dukakis takes slight lead in Vt.

Brattleboro (Vt.) Reformer carried a rape victim's unsigned letter as a front-page lead article.

The day before that Reformer item, a newspaper in a nearby city, the *Keene* (N.H.) *Sentinel*, reported that a rape had taken place. When the Reformer contacted Brattleboro Police Chief Bruce Campbell, he confirmed that the Sentinel's story was correct. The Sentinel's information had come from an unnamed source "close to the case."

Later the woman who had been raped revealed in her front-page letter that the source had been an acquaintance whose gut reaction to a reporter's question was, "Assault, what assault? You mean the rape?"

The day after the "Assault suspect sought" story, the Reformer printed "Rape suspect sought." The story quoted Campbell explaining that the police had not called the attack a sexual assault because "Publicizing such a serious and personal assault on the woman in her own community seems to me to make her twice a victim." Although she was not named, in a small town her identity might be apparent, he said.

"It's the first time to my knowledge that anyone has run an unsigned letter on Page One with a six-column headline," said Reformer editor Norman Runnion.

(Steven K-Brooks is a free-lance writer.)

At this point Reformer editor Runnion became "really, really upset" by what he perceived to be the use of code words which fudge reality.

"I asked Tego [reporter Theresa M. Maggio] to ask the police department about their policy. I felt very strongly that we should investigate the question of how the police department handled reports of rape."

"I went after it as a regular news story and tried to ask who, what, when, where, why, and how. I tried to get answers from the police department as I always do," noted Maggio in an interview.

Campbell reiterated his reasons for having called it an assault and said, "It was a judgement call."

In order to bring out the other side, Maggio interviewed Runnion.

"I have two concerns," Runnion said. "First, that people will see the word 'assault' and dismiss it as not that important . . . maybe a mugging. Secondly, if the police department is to use code words for crimes, people will assume every assault is a rape when it's not."

Runnion saw publication of the woman's letter as "an opportunity to deal with an issue that's been swept under the rug for too long."

After the front-page letter, "It became easier when I went in with the laundry list. You don't usually get a weapon like that," Maggio commented.

In her letter the woman discussed what it was like to struggle for her life; her concern with apprehension so "that no person should experience what happened to me"; the actions of the police department, and her feelings about the role of the press.

About the press, she remarked: "Members of the public have a right to know every detail of an event such as that which has happened to me for two reasons: to help apprehend the perpetrator and to help protect themselves.

"There is always much misinformation printed in the press. Part of this appears to be from no apparent policy at the police station to'central-

ize information and make conscious efforts to disseminate facts that will help locate the offender and help individuals protect themselves. One person should be the contact point for the press at the police station. The community needs to know the type of criminal activity being carried on here, and my opinion is that is best done through focused discussion and conscious, thoughtful press releases.

"I think it is perfectly appropriate — and only responsible action — for the police and media to work together to release information that a serious assault and rape has occurred in Brattleboro. The victim fought for her life and was unable to escape until he left."

In an interview, the woman pointed out that "I was driven to write the letter after reading statements by three or four people . . . about how I was feeling, and I was enraged . . . . I wanted people to know that this dangerous thing had happened in Brattleboro; why didn't people know? I did not want my name in the paper but I wanted people to know how it felt."

When she delivered her letter to the Reformer editor, she has reported, he told her, "You are reflecting exactly what I've been feeling. Would you mind if I publish it on the front page?"

Runnion told *E&P* that he has said for years that rape is a crime of violence, not a sex crime. "Therefore when she came in and handed me the letter I said to her, 'I've been looking for those words for years.' "

Referring to *The Scarlet Letter* — Nathaniel Hawthorne's story about a badge of shame placed on a woman who had an "illicit" affair — Runnion stated, "In various meetings of newspaper editors dating back almost 10 years I have argued that a 'Scarlet Letter' should not be put on rape victims."

In an editorial, "Time to abolish 'The Scarlet Letter,'" Runnion defended his front-paging the letter and discussed his motivations. He explained that secrecy and misinformation encourage stigmatization of rape victims and causes rape to be one of the most underreported crimes.

"If, on the other hand, victims are 'enraged,' not 'embarrassed,' they will pick up the phone immediately. If police have that information quickly, they can act quickly. More rapists will be arrested, more jailed."

Before publishing the front-page letter, Runnion discussed it with Chief Campbell and explained his concept of "The Scarlet Letter." Runnion says Campbell "grasped instantly what we were after." He agreed that her speaking out would increase the likelihood of other women coming forth.

About a week after her letter appeared, the Reformer carried a front-page story announcing a "March to help stop violence." In that story the woman's name was given, with her permission. She said she did not wish to be known as a rape victim, or even a rape survivor, but would rather be characterized as a "rape warrior."

In that story she said women don't report rape because "The gut reaction of the public is to blame the victim . . . and women absorb that. They ask themselves, 'What did I do to make this happen to me?'"

According to the story, last year only two rapes were reported to the Brattleboro Police, yet 20 women who said they were raped were counseled at the local Women's Crisis Center.

police and ignored by the state's attorney.

"I, too, feeling hurt and angry, wrote a letter to my local paper. They never printed it," but, she went on to say, " . . . Though the rape will hurt you a very long time maybe, because of the caring you've received from your community and the voice you've gained through your local paper, others of us, with yourself, may be able to make someone sit up and listen."

The events in Brattleboro apparently have prompted other newspapers not only to listen, but to speak out.

After members of a Middlebury, Vt., college fraternity hung a bloodied, disfigured female mannequin from a balcony during a party, the *Rutland* (Vt.) *Herald* ran an editorial deploring "ignorance of the facts of rape" and "a cavalier attitude toward

"Members of the public have a right to know every detail of an event such as that which has happened to me for two reasons: to help apprehend the perpetrator and to help protect themselves."

The march was dedicated to: "The victims who did not survive. The children who cannot yet speak. The survivors discovering our voices and our pens. Victims silent, not by choice."

Many letters of support came in.

"Every letter that has come in about this," said Runnion, "we have featured to keep the issue alive."

For at least two of the letter writers, the "Scarlet Letter" was shattered. A Chicago woman who had heard about the events in Brattleboro wrote, "I am a silent victim as well as a senior citizen who has never been able to share an early kidnapping-rape in my twenties and battering in my thirties."

She went on to say that only when she heard about the Brattleboro woman's ordeal "did all the hidden emotions well up within me and make me want to cry, 'No more silent victims.' "

The Chicago woman made a huge banner with those words, sent it to Brattleboro where it was carried at the head of the march. "No more silent victims, no more solo tears," became the march's slogan.

Another woman, who also signed her name, wrote about her experience as a rape victim two years before in Rutland, Vt. She said that, with the exception of a single policewoman who cared, her charges were treated as a joke, particularly by the state

sexual violence."

The editorial mentioned that "A rape victim in Brattleboro has chosen to speak out about her own rape in an effort to dispel ignorance that so obviously surrounds the issue." The Reformer also ran a powerful editorial about the Middlebury incident.

In addition, the Reformer reprinted an editorial, "Be 'enraged,' not 'embarrassed,' " from the *St. Albans* (Vt.) *Messenger*. The editorial praised the Reformer's crusade against public ignorance about the violence of rape.

In that piece, editor Emerson Lynn wrote, "If you think the public understands more about rape than the newspaper contends, then consider the news that came this week from Providence, R.I., where 65% of boys and girls in the seventh through ninth grades said it was acceptable for a man to force a woman to have sex if they had been dating for more than six months. On a separate question to sixth- through ninth-graders, almost 25% of those who responded said it was fine for a man to force a woman to have sex with him if he had spent some money on her." The AP account of the survey appeared on the Op-Ed page.

Three hundred people showed up for the march. Proportional to Brattleboro's population of under 13,000,

(Continued on page 41)

Vermont

(Continued from page 15)

that roughly would be equivalent to 200,000 people marching in New York City.

One of the speakers thanked editor Runnion "for making that kind of discussion possible." She specifically praised the Reformer policy of printing virtually every letter. Most marchers seemed to agree. Said one, "I think the Reformer did a fantastic job."

Police Chief Campbell came to the march as a supporter. As a person who abhors violence of any kind, Campbell said, "The public has to stop tolerating it. That's what I'd like to see newspapers say to the public — here is another person who is victimized by an unnecessary crime, and what are you going to do to stop it?"

He believes that instead of the adversarial relationship that too often exists between newspapers and law enforcement agencies, the two should work together to dispel ignorance and convey the necessity of reporting crime.

When asked what message she would like to get across to journalists, the woman who inspired the march replied, "The importance of their role as an educational tool and, if possible, the importance of looking beyond the surface explanation. I still feel the press releases are an integral part of the police department in terms of helping to apprehend, as well as serving as a warning to the residents of the community. To my mind, the newspaper is part of what makes a community."

Runnion's appreciation for this woman runs high.

"None of this would have been possible without her courage . . . I think we have been able to change the perception of rape as a crime of violence in this community. I think other newspapers, the public, and the police ought to think about what has been accomplished in Brattleboro."

Settlement

(Continued from page 16)

they were pleased with the settlement.

In the release, Stigler concluded his statement by noting, "ADVO only wants the newspapers to compete evenly and fairly with ADVO. Hopefully this lawsuit has sent a message to them that ADVO intends to protect its interests against the proven conspiratorial efforts of newspapers."

ADVO's lawsuit, filed in May 1987, chronicled its attempts to purchase a newspaper ratings study.

According to the suit, ADVO had received an offer to purchase the 1985 study from the Simmons-Scarborough partnership in July 1986 for $15,000. It did not purchase the study then.

The Simmons-Scarborough partnership dissolved soon thereafter, and each company conducted its own study for 1987.

According to the ADVO suit, Simmons "verbally" offered to sell it the 1987 Simmons study for $17,500. The Simmons representative said that the price was based on the 1985 rate plus an increase of approximately 15%.

Simmons' Schultz, however, at the time the suit was filed, said that it is Simmons' policy to charge competitors such as ADVO the highest newspaper subscriber fee, which would have been $50,600.

The suit contended that following the Simmons offer, Scarborough offered to sell its 1987 study to ADVO for $10,000.

ADVO charged that Vernon, acting on behalf of the NRC/INAME task force, and others used their leverage to "pressure and threaten" Scarborough to get the company to rescind its competitive offer.

Scarborough did withdraw its offer to sell the study to ADVO, but also did not reoffer the study at any price (E&P, May 2, 1987), and Simmons informed ADVO that the price of its study would be $50,600.

ADVO ended up purchasing the Simmons study for $50,600, and signed a subscription agreement on May 8, 1987, the suit said.

The New York Times Co., NYTRNG parent, was named as the defendant in the suit because it was the only company ADVO had direct evidence against at the time of filing — letters from Vernon as head of the NRC/INAME task force on NYTRNG stationary.

Neither the *New York Times* nor any of its company-owned regional newspapers subscribed to either study in 1987.

Letters

(Continued from page 7)

yellow printers.

Here at the *News-Dispatch*, we have also had good results by balancing the three printers for a medium caucasian flesh tone of .20 cyan, .30 magenta, and .40 yellow.

So few newspapers were still using this process that Kodak discontinued manufacture of the Resisto Rapid Pan paper intended for the system. We have continued separating with this process by switching to the same Panalure II Repro that Horn selected.

Kodak publication E-47 spells it all out, if a copy can be located. This also includes the method of making color-correction masks to correct for the ink deficiencies.

STEVEN F. PETERKA

(Peterka is associated with the News-Dispatch, Michigan City, Ind.)

Spelling contest raises $5,000 to combat illiteracy

The *Seattle Times* raised more than $5,000 to combat illiteracy in its second annual "Bee for Literacy."

The spelling contest attracted such prominent contestants as Washington Gov. Booth Gardner, who led an honorary state team, and Bruce Koppe, senior vice president of the Rainier Bank and his bank team.

Profits from the bee go to Washington Literacy, a statewide, non-profit organization striving to reduce Washington's illiteracy rate.

Proceeds were raised from entry fees and pledges. Spectators rooted for their chosen team by pledging money for each correctly spelled word.

A small fee entitled spectators to enter an audience-only spelling bee.

Children's Express gets $225,000 grant

The Carnegie Corporation has made a three-year grant of $225,000 to Children's Express, a New York-based international news service staffed by children.

The grant will be used to expand nationwide the group's Press Clubs, in which children aged 8-18 who join agree to stay informed of current events and make their opinions heard by writing letters to political leaders, corporations and newspapers.

The Press Clubs will be developed in cooperation with local newspapers that run a Weekly Feature Service produced by Children's Express, which includes articles by Children's Express reporters and letters and editorials from local children.

...with ...h in the ...

...age 2A

The slumping Houston Astros continued their skid, losing their sixth straight game Monday night.

Page 1C

TEXAS

...Higher Education Coordinating ...begun investigating allegations ...home residents in Navarro and ...es were enrolled in college ...out their knowledge. Page 2D

...rs of the communion vessels for ...Paul II's upcoming Mass say ...they've worked on compares to ...nce of this endeavor. Page 2D

NATION

...he Philippines' premier military ...oday boycotted meals and ...a second day in support of last ...dy coup attempt as the re... ...x ringleaders remained at

Page 7C

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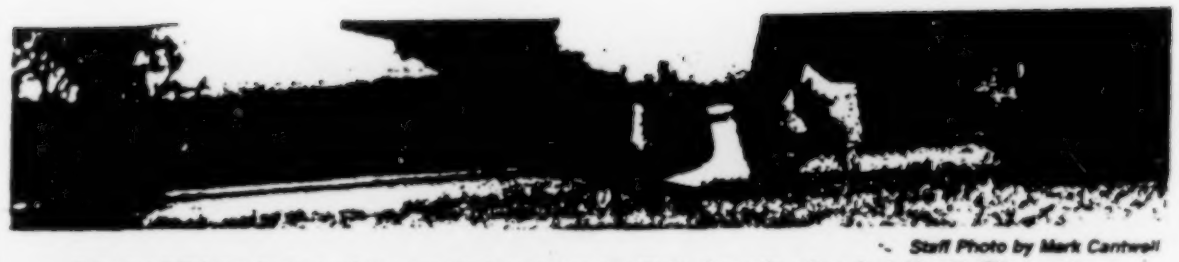

Staff Photo by Mark Cantwell

Three children leave a bus on their way to the first day of school at Kurth Elementary.

SCHOOL DAYS

It's back to school for students in Angelina County

By GEORGE SLAUGHTER
Staff Writer

Lufkin school district enrollment is running about the same as last year, officials said, and other districts said it's so far, so good on the first day of school.

Deanna Brittain, assistant to Asst. Supt. Jim Wright, said 7,292 students are enrolled in the Lufkin school district, not including afternoon kindergarten classes.

Wright said the enrollment is running "about

See SCHOOL, Page 3A

Iran said it downed three Iraqi jets and warned Iraqi civilians to stay away from economic and industrial sites across Iraq to elude retaliatory attacks.

Meanwhile, two reflagged Kuwaiti tankers escorted by American warships were cruising northward in the gulf a day after Iranian commandos in a speedboat raked a Kuwaiti vessel with machine gun fire and rocket-propelled grenades. That attack followed three days of Iraqi raids on Iranian oil installations.

In Washington, the White House on Monday termed the timing of Iraq's attacks "deplorable," but called on Iran to comply with a U.N. Security Council resolution calling for a cease-fire in the 7-year-old Iran-Iraq war.

The Iraqi announcement brought to eight the number of raids it has claimed on Iranian oil targets since breaking an informal cease-fire in the gulf.

Gulf shipping executives said an Iranian-flagged vessel was on fire near Iran's Larak island oil terminal in the Strait of Hormuz.

The executives, who requested anonymity, said they have been unable to identify the burning vessel or establish if it had been struck in one of

See GULF, Page 2A

Sept. 1, 1987

City says paper violated law

By HEBER TAYLOR
City Editor

City officials said The Lufkin Daily News violated the Open Records Law by printing statements given to police who were investigating allegations of misfeasance at the Fire Department garage.

City Attorney Bob Flournoy said this morning publication of the statements given to a detective by witnesses was a misdemeanor violation of the law. He also said publication had prevented the city from concluding its investigation and had exposed the city to the threat of lawsuits from witnesses who gave statements to police in confidence.

What do you think about the newspaper's decision to print statements from the city's fire department investigation? Call 637-NEWS.

"I wouldn't say we are to the point of filing any charges," Flournoy said. "But I want us to understand what the law is."

The newspaper, which obtained the records from confidential, unnamed sources, denied the allegation.

"The newspaper violated no laws," Joe Murray, editor and publisher, said. "Anybody who says we did is full of beans."

Jim George, the newspaper's attorney in Austin, agreed.

"The Texas Open Records Act is designed to apply to governmental officials as set out in Section 1 of that act," he said. It does not, and never was intended, to apply to anybody

See CITY, Page 3A

BOB FLOURNOY

...ter helps ...rs learn ... to teach.

...GEORGE SLAUGHTER
Staff Writer

...e taught to read, but their tutors ...t to teach.

...goal of Dr. Maryjane Cable, who ...ctive tutors the finer points of ... to read Monday night at the Lufkin ... Center, 107 E. Lufkin.

...or Bob Quillin said there are now

Search begins for new fire chief.

By KATHI WHITE
Staff Writer

The city's search for a new chief at the Lufkin Fire Department is under way.

Notices that the position is open won't be published until Thursday, but the city's personnel office said applications for chief of the Lufkin Fire Department are already being

pointed Capt. Murry Brown, who has been with the department for 16 years, to the chief's position.

"I haven't decided if I will apply," Brown said. "I'll have to see how things go for the next month or so."

Westerholm said he hopes the replacement process won't take ...too long, and to help it along he

rganized," he said. "We are nto our new elementary school nd junior high science com- lex. At noon today we'll be in ur new cafeteria dining facili- y."

Huntington: Supt. Harold hafin said the projected en- ollment for the Huntington chool district is 1,316 students. his is an increase from last pring, he said.

Wells: Debbie Johnson, a ember of the superintendent's taff, said 299 students were nrolled in the Wells school dis- rict. She said the enrollment is just about the same" from the nd of the spring semester.

Zavalla: School officials eported that about 145 students ere enrolling in grades eight rough 12. No other figures ere available at press-time.

▶Search

ntinued from Page 1A

tuation on the ambulances. ut I haven't decided what I'll . I'm studying different op- ons and getting opinions on hich way to go."

While he's trying to figure out w to help the department, own said the ambulance runs d the way the department has orked fires will not change or ffer.

"We didn't have any problems those areas before and I don't pect that to change," he said. he only real problems this e chief's resigning and the sistant chief's demotion) has used is it has disorganized the partment.

Brown said the city's in- stigation had a negative effect the Fire Department, but he nks it's only temporary.

"I believe it will get back to rmal probably in about a nth or two," Brown said. ut there's no way to predict exact length of time."

▶City

Continued from Page 1A

else. No prosecutor has ever even attempted to prosecute any non-governmental agency or individual.""

George added that if the statute did say the newspaper could not print lawfully obtained, truthful information, it would be unconstitutional.

Flournoy said he has asked for a response from the newspaper's attorneys. If one is received by 5 p.m., the matter probably will be discussed at today's meeting of the City Commission, he said.

Flournoy also said he believes the documents were leaked to the newspaper "by the City Commission" and added that the city will begin coding documents in an effort to trace leaks.

Flournoy did not allege that the newspaper obtained the records illegally.

City officials originally declined to give any details on the allegations of misfeasance at the garage, saying information would be released when a report on the investigation was completed.

When the newspaper began publishing accounts of the investigation, which determined that private vehicles had been repaired at the city garage, the City Commission called an emergency meeting and released a 23-page report on the probe.

Fire Chief Billy Stephens, citing health reasons, resigned and Assistant Fire Chief Bobby Basham requested a demotion hours before the report was released.

According to the documents obtained by the newspaper, top city officials learned a year ago that private vehicles were being repaired at the garage.

Before publishing the material, the Lufkin Daily News cleared its article with its attorneys.

Flournoy said the newspaper's decision to publish records of the investigation violated these Sections 3 and 10 of the law.

Section 3 says, in part: "All information collected, assembled or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:

"(1) information deemed confidential by law, either Constitutional, statutory or by judicial decision.

"(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

"(8) records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecutions."

Section 10 (a) says, "Information deemed confidential under the terms of this act shall not be distributed."

Flournoy said that, in his opinion, the newspaper's editors "very obviously" violated the law when they published "the sworn statements you got a copy of."

After publishing details of the city's investigation into the misfeasance allegations Thursday, the newspaper printed the full text of the city attorney's report on the investigations Friday.

Flournoy said the newspaper was entitled to print his report but violated the law when it published statements given by witnesses to police officers.

"In my opinion, that was the violation," he said. "I don't think you violated the law the following day when you printed what we gave out."

Flournoy said his report had not cited any of the statements given to police because the statements were given in confidence.

Witnesses were reluctant to talk to officers after the newspaper began publishing the statements, Flournoy said.

"It really did impede the investigation," he said. He added that the newspaper, while it has an obligation to uphold "what's right," has "the similar responsibility to uphold the law."

Flournoy said the issue needed to be resolved and added the newspaper had published confidential documents at least twice before, including a report on an investigation into police procedures earlier this year that led to the demotion of former Police Chief Leonard Latham.

Roger Moss, the newspaper's attorney in Lufkin, said "any allegations as to whether or not The Lufkin Daily News violated any criminal statutes is completely misplaced."

The law is "applicable to government entities and not to the public," Moss said. "The purpose of it is to set up guidelines for what information the government can dispense. It doesn't run toward what information the the public has a right to receive."

Moss cited Landmark Communications vs. Virginia, a case in which the U.S. Supreme Court ruled that news media have a First Amendment right to print information received regarding investigations.

In that case, a state law was passed specifically to prevent news media from publishing reports issued by a state committee established to discipline judges, Moss said, adding that the court had ruled the law infringed on First Amendment rights.

▶Tutor

Continued from Page 1A

said. "It doesn't make that much difference, though. The significant thing is their sensi-

Could you tell me what that says?" he said.

But many adults are coming in to learn how to read, Quillin said. "They learn how to be teachers also. Throughout the book they take turns teaching the next word and get some

we're doing is specific to Lufkin because they're putting their ideas into it. You have different towns, different industries and

Commissioners also passed ordinances raising water and sewer rates 11 percent and increasing sanitation fees 12 percent. Commissioners have said those increases are to needed to help those departments support themselves.

The budget, which is set for final approval Sept.

vehicles, machinery and equipment over a period of time, although some commission members said they were concerned that the city is having to borrow money to buy such items.

The items include $210,200 worth of cars — 15 in

See BUDGET, Page 2A

- Voted 6-1 to allow Circus Vargas to perform at Morris Frank Park Oct. 13 and 14.
- Approved, on first reading, a zone change that would allow the Chamber of Commerce to build new offices on the Loop.

Sept 2, 1987

JELLY BEANS

Port Lavaca man hopes for big things from small mesquite beans

PORT LAVACA, Texas (AP) — Jim Chatelle hopes to become the king of mesquite, the thorny trees that dominate portions of the Texas landscape.

But unlike the popularity of mesquite wood for barbecue flavoring, Chatelle is appealing to the sweet tooth of Texans with his mesquite bean jelly.

"Mesquite wood is the hottest thing in barbecue," he says. "We're just jumping on the bandwagon."

Two years ago, Chatelle, laid off with the closing of the Port Lavaca chemical plant where he worked, took his mother's old mesquite jelly recipe and made a few dozen jars to give away as gifts for friends and relatives.

So many people liked the sweet mesquite-flavored jelly and asked for more that last August he made 75 dozen half-pint jars with the idea of selling them

See BEANS, Page 3A

AP Laserphoto

Jim Chatelle picks through a stack of mesquite beans from which he will make mesquite jelly. Chatelle, who had been laid off when the Port Lavaca chemical plant closed, made a hit during Christmas with his mother's mesquite jelly recipe. This Christmas, he's hoping to become the king of mesquite.

Flournoy criticizes newspaper

By HEBER TAYLOR
City Editor

City Attorney Bob Flournoy blasted The Lufkin Daily News Tuesday, saying an article in yesterday's edition was incorrect and that he never accused the paper of violating the law as the paper reported.

The article quoted Flournoy as saying that the newspaper violated the Open Records Law by printing statements given to police who were investigating allegations of misfeasance at the Fire Department Garage.

Flournoy, in a statement to city commissioners Tuesday night, said the article was inacurate in a number of respects and gave the erroneous impression that the City Commissionion had accused the newspaper of wrongdoing.

Flournoy's statement drew no response from commission members.

Before Flournoy addressed the commission, Mayor Pitser Garrison said he did not care to get "into a feud with the newspaper," adding, "They do their own business, and we do ours."

Flournoy said he originally talked to Joe Murray, editor and publisher.

"I went yesterday to see Joe Murray because of my concern that The Lufkin News had printed this in violation of the law. I was not prepared to make any sort of an allegation that they had violated the law. I went to him as a friend, I went to him as a person I think of integrity and told Joe that in my opinion this violated the law, that I wanted to know what their opinion was and if they would have their attorneys contact me we could talk about it and if I was wrong about the law then I needed to know that, and certainly before any allegations were made.

"He didn't tell me then but I see in the paper it says that I'm

See FLOURNOY, Page 2A

Flournoy misquoted

City Atty. Bob Flournoy was incorrectly quoted in Tuesday's Lufkin Daily News.

The News quoted Flournoy as saying he believed information on the fire department investigation was leaked "by the City Commission."

The correct quote was "from within the City Commission," indicating a single commissioner and not the commission as a whole.

day

2, 1987

245th day of 1987
of summer

od to be alone,
ise." — Yiddish

JLP WILKERSON
e Editor

students were
otal of eight
at the recent
ation of Jarvis
ge in Hawkins.
III received

WILKERSON

for the 1987-88
eland is the son
. Henry Dixon.
n speaker was
Air Force Colo-
). Gregory, the
onaut to pilot a
e.

birthdays:
ationist
ry is 79. Sen.
n, R-Wyo., is
Commissioner
oth is 50.
player Terry
Actor Mark
Tennis player
is 35. Actress

ays: Happy
Markle

Flournoy

Continued from Page 1A

full of beans.

Flournoy said he told Managing Editor Phil Latham that he did not intend to say anything about the matter until he heard from the newspaper.

Flournoy said he later talked to City Editor Heber Taylor, who asked questions about the discussions.

"I had no idea they had any intention of printing any sort of story. He (Taylor) said to me, Well, do you mind if I mention that you may bring it up at the council meeting tonight? I said, Well, I don't know why you asked me for my permission for you to put something in the paper. You've never done that before. I still had no idea that (he) really intended to write a story and today it takes up ... well, it's a rather long story.

"Much of it is not correct and it leaves the impression that this city council has accused them of something. And that's just not true. And that's not the reason I went to them.

"I went to them to talk about it so that we may never have this problem... This is the third time that I know of that stories have gone to them that were in the nature of confidential information and they've printed it.

"I simply think that it it's a violation of the law we need to have an understainding that it's a violation of the law and that that not occur in the future."

Flournoy said he made no accusation of filing any charges against the paper, although he added that he thought the paper had violated the law by publishing confidential documents.

Flournoy said the Police Department and his office began investigating allegations of misfeasance at the Fire Department garage at the direction of city commissioners.

Investigators took about 30 sworn statements "on the basis that those statements were confidential when we took them," Flournoy said. "They were sworn to, and we did everything we knew how to do to maintain the confidentiality of that for those individuals and because it was a vital part of our investigation."

However, copies of the statements apparently were delivered to the paper, Flournoy said, adding that The Daily News had misquoted him completely on his views on the source of the leak.

"This article says that I said that the City Commission leaked those statements to the newspaper and I did not say that. That's a quote in that paper, and I talked to Joe Murray about that today and he agreed that I did not say that and I suppose he will make a retraction. I want it clear, that I never said that the city commisssion did that.

Flournoy also said the headline was incorrect and that the article was not "a fair reflection on this city."

Flournoy objected to a News Poll accompanying the article that asked readers to air their views on the newspaper's decision to print the information.

"Now, it's a question of law, not a question of fact," Flournoy said. "They're either entitled to do it or they're not entitled to do it and that's all I was trying to do. Obviously individuals will not know what the law is. I don't know yet that I can say with all certainty that I know what the law is. But I had hoped that I might hear from them before this story was printed."

Budget

Continued from Page 1A

all — as well as three garbage trucks totaling $194,500. The plan also includes a $13,000 van, which Police Chief Sherman Collins said would be used to transport prisoners to jail.

Other equipment to be purchased includes $7,500 worth of radars, $7,590 for seven walkie talkies and 10 pagers, 16 file cabinets for $6,580 and 13 typewriters for $8,355.

Representatives of three groups appeared before the commission to ask for more money.

Dr. Royce Read, representing the Angelina County-Cities Health District, asked for $31,250 to continue funding to the indigent health care clinic. The city budget does not include funding to the clinic past December, Read said, adding that some of the patients treated by the clinic make less than $75 a month.

Read said funding from the city was important, but added that the clinic has other sources of income, including grants and payments from Angelina County.

Asked what would happen if the city discontinues funding the clinic, Read said clinic patients under the federal poverty guidelines would be treated by the county, but those that are just that their seemed to be an "antagonism" between the commission and institutions that it supports.

"You left the impression the city doesn't support the library," he told Miss Allen. He said the city supports the library but added funds were tight.

Miss Allen said she did not intend to leave the impression the city doesn't support the library.

Garrison said the city didn't have the money to fund the requests. Ward 5 Commissioner Jack Gorden suggested representatives of the groups come back in six months, adding the commission would be more receptive to spending the money if the local economy improves.

Ward 4 Commissioner Pat Foley asked City Manager Harvey Westerholm how much the tax rate would have to go up to meet the Fire Department request. Westerholm said there would have to be a 3½-cent rate increase.

Commissioners, in discussing the request for $300 a month raises, were told it would cost the city $1.91 million to give such a raise to every city employee.

Chastain said the raise commissioners have already put in the budget "isn't going to help much." The raise is for...

Man hurt when hand is caught in machine

Glen Pickard, 43, of Lufkin was listed in good condition at Houston's Park Place Hospital after his hand was caught in a machine at Southwest Color Printing Corp Tuesday morning.

Pickard's nurse said he was having a little pain but was doing well.

Pickard was transferred to Houston after being taken to HCA-Woodland Heights Medical Center by a Lufkin Fire Department Ambulance.

A LUFKIN woman sustained minor injuries in a hit-and-run accident that occurred at Denman and Timberland around 2 p.m. Tuesday.

Maxine Williams, 73, of 1414 Diana Street was taken to Memorial Medical Center of East Texas where a hospital spokeswoman said Ms. Williams was treated and released.

According to a police report, Ms. Williams was injured when the 1985 Pontiac she was riding in, driven by Virgil Martin Williams, 78, also of Lufkin, was struck in the rear by a black 1976 or 1977 Chevrolet Monte Carlo.

Police roundup

Hudson to meet on budget

HUDSON — The Hudson City Council will meet in regular session Thursday to hold a public hearing and approve a $457,589 budget for 1988.

The meeting is scheduled for 7 p.m. Thursday at the Hudson Fire Station.

The budget is an increase of $17,200 over last year's budget of $440,389, or a 3.9 percent increase. The council will set a tax rate following adoption of the budget.

Councilmembers also will hear a report from a committee concerning the feasibility of begininning a police department and will discuss purchasing a tractor for the city.

Lufkin woman suffers minor injuries in wreck

A Lufkin woman suffered minor injuries Tuesday afternoon when she was involved

said Ms. Griffin had some cuts and bruises and was treated and released.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 87-329

In The

Supreme Court of the United States

October Term, 1988

THE FLORIDA STAR,

Appellant,

v.

B.J.F.,

Appellee.

On Appeal from the First District Court of Appeal for the State of Florida

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF APPELLEE

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No. 87-329

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THE FLORIDA STAR,

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B.J.F.,

Appellee.

On Appeal from the First District Court of Appeal for the State of Florida

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF APPELLEE

IDENTITY AND INTEREST OF AMICUS

This amicus curiae brief of Pacific Legal Foundation (PLF) is respectfully submitted pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for appellant and appellee; these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting

public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because the Foundation considers the preservation of individual privacy rights of the highest order. The Foundation supports the right of the individual not to disclose information of a personal nature. The Foundation has experience supporting individual rights. In an analogous case, before this Court, *Frisby v. Schultz*, 487 U.S. ___, 101 L. Ed. 2d 420 (1988), the Foundation supported the protection of privacy in the home and reasonable regulation of residential picketing.

STATEMENT OF CASE

This case is important because the claims of privacy by appellee directly confront the constitutional freedom of the press. This Court has recognized a constitutional right of privacy encompassing an individual interest in avoiding disclosure of personal matters. This case will allow the Court to clarify this privacy right as well as establish the standard by which courts can determine when the right of privacy prevails over the freedom of the press.

B.J.F. filed a police report with the Jacksonville, Florida, Sheriff's Department alleging, in part, a rape. An employee of the Sheriff's Department inadvertently released the report by placing the report in the department's pressroom with unrestricted access. A reporter trainee for The Florida Star copied down the information in the report including B.J.F.'s name and gave the information to her newspaper. Another reporter failed to delete B.J.F.'s name from the report of the crime. The newspaper published the account of the rape identifying B.J.F. by name as the victim. At the time of the publication the assailant was still at large.

Florida statutes provide access to the public of all public records with certain exceptions including sexual offense records. Florida affirmatively prohibits disclosure of the records at issue in this case. The statutes also make it a criminal offense to publish the name of a rape victim. Florida law further provides that the violation of a criminal statute is negligence per se.

B.J.F. sued Florida Star in state court on a common law invasion of privacy and negligence per se basis. The court issued a directed verdict on negligence per se, and the jury awarded B.J.F. $25,000 in compensatory damages and $75,000 in punitive damages. The Florida District Court of Appeal, First District, affirmed and the Florida Supreme Court denied Florida Star's petition to review the decision.

The statute now comes before this Court having been found constitutional by the First District Court of Appeal for the State of Florida under the First and Fourteenth Amendments of the United States Constitution. This case

presents the Court with a direct conflict between two competing constitutional rights, the individual's right of privacy and the freedom of the press.

SUMMARY OF ARGUMENT

Even though the Constitution does not expressly state that there is a right of privacy this Court has recognized a constitutionally based right to privacy which protects private facts from public disclosure. B.J.F.'s interest in her well-being, the state's interest in protecting the well-being of its citizens, the important public interest in the prosecution of a crime of rape, and the protection of the rape victim from the dangers from an assailant still at large are paramount interests in this controversy.

The press does not have an absolute right to print factual matters under the First and Fourteenth Amendments to the United States Constitution. Police records identifying the name of a rape victim are confidential records under the Florida statutes. The publication of the name of a rape victim is unlawful under the Florida statutes and the publication is not protected by the First and Fourteenth Amendments.

This Court should employ a balancing test when the individual right of privacy is in direct conflict with the freedom of press. Protecting the privacy rights of an individual by prohibiting the publication of the name of a rape victim only minimally interferes with the freedom of the press.

ARGUMENT

I

THE CONSTITUTION PROTECTS THE RIGHT OF PRIVACY

A. The Decisions of This Court Recognize a Constitutionally Based Right to Privacy

While there is no right of privacy explicitly enunciated in the United States Constitution, the Supreme Court has construed the Constitution to protect certain privacy interests. *Roe v. Wade*, 410 U.S. 113, 152 (1973). This federal constitutional privacy has been characterized as consisting of three protected interests. *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Shevin v. Bryon, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 636 (Fla. 1980). One interest is the individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs. *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967). The second interest is a person's interest in decisional autonomy on personally intimate matters. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113. The third interest is the individual interest in protecting against the disclosure of personal matters. *Whalen v. Roe*, 429 U.S. at 599.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 487 (1975), this Court recognized that powerful arguments have been made for a zone of privacy surrounding every individual which may protect him or her from intrusion by the press on essentially private information. It was not until *Whalen v. Roe* and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), however, that the

Supreme Court expressly mentioned the disclosural privacy right.

B. The Right to Privacy Protects Private Facts from Public Disclosure

In *Whalen v. Roe*, 429 U.S. 589, this Court reviewed a state statute that required doctors to disclose to the state the identities of patients obtaining specified prescription drugs so that their names and addresses could be recorded in a centralized computer file. While recognizing that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy, this Court ruled that the privacy interest at issue had not been seriously invaded by the state in this case. 429 U.S. at 603-04. This holding has created confusion in the lower courts although a majority of the federal courts interpret *Whalen* as recognizing a constitutional right to non-disclosure. Comment, *Privacy and the Press: A Necessary Tension*, 18 Loy. L.A.L. Rev. 949 (1985).

Whalen was reaffirmed by this Court in *Nixon v. Administrator of General Services*, 433 U.S. 425. In *Nixon*, the former President challenged a statute requiring his papers and tape recordings to be screened by government archivists. During the Court's discussion of the privacy claim, the Court stated that "one element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters." *Nixon*, 433 U.S. at 457 (citing *Whalen v. Roe*). The Court, however, held the statute constitutional. In so holding, this Court noted the limited intrusion of the screening process, the President's status as a public figure, the lack of any expectation of privacy in the majority of the materials, and the public

interest in the preservation of those materials. The Court also noted that the statute did recognize and protect the former President's legitimate privacy interests. *Nixon*, 433 U.S. at 465.

In a more recent case *Seattle Times Company v. Rinehart*, 467 U.S. 20 (1984), this Court recognized an analogous right of privacy. In *Seattle Times* the newspaper companies challenged a protective order prohibiting them from publishing information they had obtained through discovery initiated in preparation for trial in a civil case. Relying on *Whalen* and *Cox* in discussing the governmental interest behind the discovery rule supporting the protective order, the Court stated that the rule implicitly supported privacy interests of litigants and third parties. *Seattle Times*, 467 U.S. at 35.

C. The Privacy Rights at Stake in This Controversy Are Paramount

The primary interest underlying B.J.F.'s claim for a right of privacy is her interest in her own well-being. The state also has a legitimate interest in protecting the well-being of its citizens. Privacy reflects the basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (citing Supreme Court cases discussing the importance of the right of privacy). Many facets of the well-being of a rape victim are at issue when her name is published by the press.

Rape is the "ultimate violation of self." *Coker v. Georgia*, 433 U.S. 584, 597 (1977). To publicize the name of the

rape victim adds additional injury to the victim in the form of embarrassment, humiliation, degradation, and further psychological injury. Publication also detracts from the rehabilitation of the victim. Because rape undermines the sense of security, there is public injury as well.

Further, the publication of the name of the rape victim adds to the stigma associated with being identified as a rape victim. *Cf. Smith v. Daily Mail Publishing Company*, 443 U.S. 97, 108 (1979) (Rehnquist, C.J., concurring) (prohibiting publication of a juvenile's name protects him from the stigma of his misconduct). There remains today the myth that women who are sexually assaulted somehow ask to be raped. The Iowa Coalition Against Sexual Abuse, *News Coverage of Sexual Assault* 13-14 (1986). Publication of the name of the victim fosters this stigma by focusing public attention on the victim who then becomes the target of public ridicule. Describing the details about the victim tends to foster the idea that the blame for crime is on the victim rather than the assailant.

Another important interest both for the individual and the state is the prosecution of crime. The individual has a duty of citizenship to report criminal conduct. *Roberts v. United States*, 445 U.S. 552 (1980). Encouraging victims to come forward and complain facilitates the prosecution and conviction of rapists. Rape is one of the most unreported crimes. Bureau of Justice Statistics, U.S. Dep't of Justice (T. Flanagan and K. Jamieson, eds. 1988), *Sourcebook of Criminal Justice Statistics (1987)*. The main reasons stated by those who do not report this offense is that it is a private or personal matter, fear of reprisal and police insensitivity and ineffectiveness. United States

Department of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* (1986), National Crime Survey Report, NCJ-11456, Table 102 at 88-89 (Washington, D.C. 1988). *Cf. Her Majesty the Queen v. Canadian Newspapers Company, Ltd.*, 16 D.L.R. 642 (Can. S.C. 1985) (main reasons for not reporting sexual assault are fear of treatment by police or prosecutors, fear of trial procedures, and fear of publicity or embarrassment). Sexuality usually is considered a private matter. Sexual assault is an attack on the most private and vulnerable part of an individual's physical being and psych. Publicity discourages victims from coming forward and prosecuting the assailant over such a private matter and definitely results in lower reporting of sexual assaults.

Fear of reprisal, harassment, and overall danger from the assailant is another interest deserving of protection because this protection fosters criminal prosecution, protection of citizens, and the rape victim. Publication of the name of the rape victim does not serve these interests. Publication of the name of the victim when the assailant is not yet in the custody of the police is not in any public interest. The disclosure does not aid the criminal investigation, but rather could be an impediment to prosecution by encouraging the obstruction of justice by the assailant. The disclosure is also a threat to the very personal safety of the victim. *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. App. 1982), *cert. denied, Tribune Publishing Company v. Hyde*, 459 U.S. 1226 (1983).

II

FREEDOM OF PRESS IS NOT ABSOLUTE

This Court has never held that the press has an absolute right to print factual matters under the First and Fourteenth Amendments of the United States Constitution. In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. at 491, this Court held that a state may not impose sanctions on the accurate publication of the name of a rape victim that had already been made public in judicial records maintained in connection with public prosecution and open to public inspection. *Cox* is distinguishable from this case both factually and legally.

In *Cox* the reporter learned the name of the victim from an examination of the indictments which were made available for his inspection in the courtroom. The Court noted the fact that the indictments were public records. 420 U.S. at 473.

In *The Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986), the reporter learned the name of the victim from a copy of the police report which an employee of the Sheriff's Department inadvertently made available in the department's pressroom. Florida statutes define public records to include police records but provide certain exceptions. Section 119.07(3)(h) (1988) of the Florida statutes excludes the name and address of the rape victim from disclosure as a public record thereby making the name confidential information.

The key point for the Court in *Cox* was the fact that the reporter obtained the information from official

records which were open to the public in a judicial proceeding. This is clear from the rationale of the Court in discussing the policies important to the Court's decision. The court said:

> "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." 420 U.S. at 495.

Appellant contends that public records including police records are official records and therefore available to the public. Florida statutes clearly exclude those police records containing information identifying rape victims from public records and nothing in the Constitution requires the states to make this information public. The Florida statutes excluding police records containing information identifying rape victims do not conflict with the policies underlying the decision in *Cox*. Generally public records are subject to the right of inspection and publication. *Patterson v. Tribune Company*, 146 So. 2d 623 (Fla. Dist. Ct. App. 1962). This right does not apply to all public records since public policy requires some of them, although of a public nature, be kept secret and free from inspection. *Glow v. State*, 319 So. 2d 47 (Fla. Dist. Ct. App. 1975). Information relating to the apprehension and prosecution of criminals contained in police reports is an

example of public records which should not be made public. *Id.* at 49.[1]

Appellant's reliance on *Oklahoma Publishing Company v. District Court*, 430 U.S. 308 (1977), and *Smith v. Daily Mail Publishing Company*, 443 U.S. 97 (1979), is also misplaced. Although the result of both cases was to permit the publication of lawfully obtained information, including the names of juvenile offenders, both *Oklahoma Publishing* and *Daily Mail* qualify their holdings. A state may impose a penalty for publication of lawfully obtained information if it is necessary to further a state interest of the highest order. *Smith v. Daily Mail*, 443 U.S. at 103. Additionally, *Oklahoma Publishing* and *Daily Mail* are factually inapposite to this case.

In *Oklahoma Publishing*, 430 U.S. at 310, this Court held a court order prohibiting the publication of information obtained in an open, public court proceeding invalid. The Court reasoned that members of the press were present at the hearing with the full knowledge of the presiding judge, prosecutor, and defense counsel. Additionally, no objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left. In this case, however, the disclosure

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[1] *See also Hyde v. City of Columbia*, 637 S.W.2d at 260. Other state and federal sunshine laws provide exemptions from disclosure for records of the criminal investigative process. The efficient suppression and punishment of a crime is so paramount a government function (as is the protection of persons upon whom the function impinges) that nondisclosure of this information is justified and serves the public interest. *Id.*

was inadvertent and was not made in connection with an open, public proceeding.

In *Daily Mail* a state made it a misdemeanor for only the print media to publish in a newspaper the name of a juvenile offender. The statute did not extend a similar prohibition to radio and television broadcasters. The court held that the statute violated the First Amendment because the state interest in protecting the anonymity of the juvenile offender did not justify the statute's imposition of criminal sanctions on only one type of publication. *Daily Mail* does not control this case because there the issue was more one of discrimination between types of media rather than privacy. 443 U.S. at 105. Florida's interest in the privacy of rape victims is not clouded by a statute like that in *Daily Mail* which only covers the print media.

Florida Star also contends that it had obtained the information lawfully because it received the police report from the government. The government did not give the press the information. An individual employed by the government violated the statute by failing to keep the document confidential and allowing the press access to the information. The mere fact that the government makes it easy to violate a law does not absolve one of responsibility for that violation. The Florida statutes make publishing the name of the rape victim unlawful. Fla. Stat. § 794.03 (1976). The fact that an employee of the Florida Sheriff's Department mistakenly provided the Jacksonville newspaper with the victim's name does not

make the publication of the information lawful.[2] The statute places responsibility on the person publishing the information regardless of how the information was obtained. If there is no penalty on the press for publishing information mistakenly provided by a government employee then the First Amendment becomes a shield for irresponsibility and, in this case, criminal behavior of the press. There is a state interest in ensuring that *all* citizens, including the press, obey the laws enacted to protect the public from personal endangerment.

III

B.J.F.'S PRIVACY RIGHTS OUTWEIGH ANY LIMITED BURDEN ON FLORIDA STAR'S FIRST AMENDMENT RIGHTS

A. A Balancing Test Is Appropriate to Determine Claims Between Competing Constitutional Interests

Although the interest in avoiding public disclosure of personal matters has been recognized by this Court, it is less clear what standard to apply in a case of a disclosure. In *Whalen* the Court did not discuss the nature of the disclosural privacy interest and the standard to be applied. In *Nixon*, the Court balanced the interests involved and upheld the law. In *Seattle Times* the Court recognized an analogous right of disclosural privacy and determined that a balancing should be employed at the

[2] Florida Star's argument in this regard is analogous to that of a bank customer who receives a cash windfall because of a teller's error. Notwithstanding the error, the bank did not make a gift and the customer must return the money. Similarly, the error of a Sheriff's Department employee did not render the statutory privacy protections a nullity. However Florida Star obtained the information, it was not entitled to publish the name of a rape victim.

trial court level to weigh the competing needs and interests of the parties affected by discovery.

Amicus contends that a balancing standard is the appropriate standard of review to apply when the individual right of privacy is in direct conflict with the freedom of the press. A balancing test is appropriate for several reasons. Although the United States Courts of Appeals are split over whether *Whalen* provides a right to withhold private information, in those circuits recognizing this right, the courts have employed a balancing test. *See, e.g., United States v. Westinghouse Electric Corporation*, 638 F.2d 570 (3d Cir. 1980) (balancing interest in disclosure of medical reports); *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981) (remanding to balance competing interests in disclosure of subpoenaed testimony); *Plante v. Gonzalez*, 575 F.2d 1119, 1128 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) (balancing interests in disclosure of personal finances of public officials).[3] These circuit courts have rejected other standards as inapplicable for legal and policy reasons.[4]

[3] *Cf. Virgil v. Time*, 527 F.2d 1122 (public's right to know under the First Amendment is subject to reasonable limitations so far as concerns private facts of its individual members). *Gilbert v. Medical Economics Company*, 665 F.2d 305 (10th Cir. 1981) (in a tortious invasion of privacy action, media's constitutional privilege is not absolute--the right of the individual to keep information private must be balanced against the right of the press to disseminate newsworthy information to the public).

[4] *See, e.g., Plante*, 575 F.2d at 1128, 1134. The court notes that in the decisional autonomy cases there is a fusion of the equal protection and due process standards. The *Plante* court states that privacy challenges are not brought as requests for equal protection but as demands for due process. Further, a rationality or strict scrutiny standard would not adequately protect both the interests of the press and the individual.

The balancing test employed by the Due Process Clause of the Fourteenth Amendment is the more appropriate approach even though the right of privacy cases involving decisional autonomy seem to employ something of a strict scrutiny analysis. *Plante*, 575 F.2d at 1134. *See Roe v. Wade*, 431 U.S. at 499 (despite the use of the compelling state interest terminology, the court actually balanced the competing individual and state interests).

If the strict scrutiny test were applied in favor of press freedoms in this case and any similar case involving a direct clash between the disclosural privacy right and freedom of the press, the privacy right would not be protected. To survive strict scrutiny a law must have a compelling state interest. In the equal protection cases, however, strict scrutiny usually has been "strict in theory but fatal in fact." *See* Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. DeSanti*, 71 Geo. L.J. 219 (1982).

Applying a mere rationality standard would also be inappropriate for it would not adequately protect the First Amendment rights of the newspaper. *Plante*, 575 F.2d at 1134. A mere rationality standard could extend a prohibition on the publication of names of rape victims to all names of all persons involved in a matter of public concern. The rationality standard is not in accord with the special status accorded the press by the First Amendment.

A balancing test would eliminate any potential arbitrariness that may result from applying another standard and would allow the Court to examine the intrusion upon an individual's privacy and weigh it against the policies

underlying the First Amendment right of the public to know. Further, a balancing test would give the judiciary flexibility in evaluating the disclosural privacy rights since many different interests may be involved.

B. Press Freedoms Are Not Significantly Burdened by the Florida Statute Here at Issue

The interests of B.J.F. and the State of Florida must be balanced by the special solicitude this Court has given to freedom of the press. A free press is indispensable to a free society. The role of the press is to bring to the citizen in a convenient form facts about the operation of his government. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. at 492. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government. *Id.* A major purpose of the First Amendment was to protect the free discussion of government affairs. *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838 (1978).

Prohibiting the publication of the name of the rape victim, especially when the perpetrator is still at large, does not infringe on these policies. There is no pending prosecution nor any judicial proceeding for that matter. Florida Star argues that the publication of the name of the rape victim is part of the fact of the commission of the crime. Clearly, the public has a need to know that a crime has been committed in their community because it is something society must be aware of in order to protect itself. Naming the victims, however, is unnecessary to

essential elements of the story being told. *Williams v. New York Times, Inc.*, 462 So. 2d 41 (Fla. Dist. Ct. App. 1984); *Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310 (N.M. Ct. App. 1978). There is no legitimate public concern in the morbid desire to connect the details of the detestable crime with the victim's name. The public does not need to know the victim's name in order to function as a democratic society. *Poteet v. Roswell Daily Recorder*, 584 P.2d at 1314. It is difficult to understand how publication of the name of a rape victim is in any way necessary to the performance of the press as the people's watchdog.

Without providing for punishment of unauthorized publications it will be virtually impossible for the state to protect the privacy of its rape victims. Even though the state has responded by providing a means of ensuring these records are confidential, the press may still be able to obtain the name of the rape victim. In this case the press gained the information inadvertently from a government employee. In such a case, application of tort law is the only way for the state to ensure anonymity of its rape victims. Once the name of the rape victim enters the public domain or the victim consents to publication, however, the press would be free to publish the name of the victim without liability. *See Boettger v. Loverro*, 502 A.2d 1310, 1315-16 (Pa. Super. Ct. 1986) (statute imposing liability for publication of wiretapped conversation contains implied exemption for publication of lawfully obtained information of legitimate public concern).

Prohibition against the publication of the name of a rape victim represents only a minimal interference with the freedom of the press. The press is free to describe the details of the offense and inform the community of any

proceedings against the assailant. Appellant contends that the press can never be penalized for publishing the truth. Freedom of the press does not mean the press is free to publish with impunity everything and anything it desires to publish. *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). Many states have long recognized a right to privacy that could outweigh the press' right to publish. *E.g., Briscoe v. Reader's Digest Association, Inc.*, 4 Cal. 3d 529, 540-41 (1971); *cf. Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967). This Court clearly has left open the question of whether the press could ever be subjected to civil or criminal liability for a truthful publication without violating the First and Fourteenth Amendments. *Cox*, 420 U.S. at 492. *Cox* does imply, however, that the press could be penalized for publication of purely private facts which are of no legitimate concern to the public and that are not in the public domain. *Cox*, 420 U.S. at 492, 495. If the press could never be penalized for publishing the truth, the individual would never have an action, whether based on the federal Constitution or state law, for an invasion of privacy. The individual would be unable to enjoy a private life save with the leave of the press. *See Virgil v. Time*, 527 F.2d at 1127; *Cilbert v. Medical Economics Co.*, 665 F.2d at 308.

CONCLUSION

This Court has recognized a constitutional right of privacy encompassing the individual interest in avoiding disclosure of personal matters. When this right of privacy is in conflict with the freedom of the press the Court must balance the competing interests to determine whether the individual's right of privacy is to be preserved.

The Florida statute which penalized Florida Star for the publication of the name of B.J.F., a rape victim, does not violate the First and Fourteenth Amendment of the United States Constitution. The statute serves a paramount state interest by protecting the privacy and anonymity of rape victims. Florida Star violated state law and B.J.F.'s right to privacy by publishing her name in the press. B.J.F.'s injury was compounded by the fact that at the time of publication, the assailant was still at large.

Publication of a rape victim's name is not necessary to reporting the story of a commission of a crime. Protecting a victim's privacy does not interfere with the role of the press as the people's watchdog over the government. The interest of the state in the well-being of its citizens and the prosecution of criminals outweighs any benefits the public may derive from connecting the name of a rape victim to the crime. Protecting the individual's right to privacy is as fundamental to a democratic society as the freedom of the press. To serve these competing interests, the Court must employ a balancing test that would weigh an individual's right to privacy against the important role the press plays in our system of government. On balance, prohibiting the publication of the name of the rape victim

is an inconsequential interference with the freedom of the press.

For these reasons, this Court should uphold the decision of the First District Court of Appeal of the State of Florida.

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Respectfully submitted,

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